

Tagore Law Lectures, 1908

CUSTOMS
AND
CUSTOMARY LAW
IN
BRITISH INDIA

BY
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P R E F A C E.

The contents of the following pages have been the subject of a series of Lectures delivered by me, as Tagore Law Professor for the year 1908, at the University of Calcutta during the latter end of January and the first week of February 1909.

Though under the revised rules the manuscripts of the entire lecture were submitted by me to the Syndicate and approved of by a Committee as "complete and ready for the Press" before it was actually delivered, there has been an unfortunate lack of expedition in its publication. For this regrettable delay, though it was beyond my control, I beg to tender my apologies to the Profession.

In preparing these lectures I experienced considerable difficulties in my search for old reports and references. The decisions of the Sudder Dewany Adawluts are pre-eminently important on questions of customs and usages, but some of these reports are of such rarity that I was unable to consult them. Consequently I have not succeeded in making these lectures as comprehensive as I desired. Further, the time limit, within which an elected Tagore Law Professor has under the new rules to write out his lectures, has in no inconsiderable degree hampered me in doing justice to the subject, which, I need hardly say, is not merely vast but also original. In this book I have only succeeded in embodying most of the decisions bearing upon various customs

PREFACE.

and usages which came up before Courts of Law for their decision. But outside these, there exist innumerable customs and usages in all parts of the country, among civilized and uncivilized people, which have not yet come to Courts of Law. Into these I have not been able to extend my investigation for want of time and means. Moreover in order to carry on an investigation into these customs and usages, it would be necessary to have the collaboration of other workers without which so stupendous a task would be impossible of accomplishment. Should such voluntary co-operation and means be ever forthcoming in the future, I should feel it an honour to be allowed to contribute my humble quota of labour towards the completion of that *magnum opus*.

The numerous difficulties that have attended me in preparing these lectures will, I hope, induce the generous Profession to look with a favourable eye upon its many imperfections of which no one is more conscious than myself. I will consider my humble labours well-recompensed if I can think that I have facilitated the future labours of others in this line.

I beg to express my indebtedness to Sir Wm. Rattigan from whose excellent work I have taken the subject-matter of my lecture on the Punjab Customs.

CALCUTTA.

24th December, 1910.

S. R.

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CUSTOMS AND CUSTOMARY LAW

IN

BRITISH INDIA

INTRODUCTORY.

It requires no special reasoning to satisfy oneself that of the two—Custom and Law—Custom is of far earlier origin than Law. Law which is the product of a rather complicated machinery of Social and Political organization was unknown, at any rate, in its present sense, in the primitive ages when society was not, “as at present, a collection of individuals but an aggregation of families.” There was then no king or sovereign to frame rules or set ‘law’ for these families. One family was independent of another and followed its own head, whose will or pleasure was ‘law’ unto its own members. As families expanded into a community and the community into a tribe, rules and principles were established for the guidance of its members, and for the regulation of its internal economy. They continued for ages, and existed long before any attempt to legislate was made by a Sovereign authority, and, having been handed down from generation to generation, came to be regarded as sacred traditions and customs governing the tribe.

It is not merely that ‘law’ is of very recent origin but that, in most cases, it has been based upon custom and

Priority of
Custom to
Law.

Law was
built upon
custom.

usage.¹ In tracing the gradual development of 'law,' one thus sees how custom has been the very corner-stone of the legal superstructure. It has been so not in ancient Greece, Rome or India alone, but in every country, ancient² or modern. The Common Law of England, most of which is now embodied in Acts of Parliament or judicial decisions, at one time consisted of a collection of unwritten customs which had subsisted immemorially in the Kingdom.³ The Roman law, which theoretically rests on the twelve Decemviral Tables and, therefore, on a basis of written laws, was, to use the words of Sir Henry Maine, "merely an enunciation in words of the existing customs of the Roman people."⁴ Savigny remarked that the oldest law in Rome, as among all nations, was founded on the common understanding and consent of the people without any other apparent basis, and this we are accustomed to call *consuetudinary* law.⁵ And as regards Hindu law, it is not merely based on immemorial customs, but customs form a very important branch of that law.⁶

Various uses
of the term
'Law.'

Before we proceed further, let us have a clear understanding of the term 'law.' As we all know the term 'law' has been applied rather loosely to various matters which are not the proper subject of jurisprudence. For instance, we speak of 'laws of God,' 'laws of Nature,' 'laws of Gravity,' 'laws of fashion' or 'laws of honour,' 'physical laws,' 'moral laws, and so forth. In these, no doubt, the term 'law' is applied either as a metaphor or by way of analogy. But the term, in a more strict

¹ Prof. Newman observed 'Law is everywhere built upon custom.'—*Misc. Lect.* ii, p. 166.

Herbert Spencer speaks of the "gradual establishment of law by the consolidation of custom."—*Study of Sociology*, p. 108.

Plato recognises customs as existing before law.—*Repub.* ii,

Grote's *Plato*, Vol. III, p. 47.

² *Vide* Stephen's *Commentaries*, Vol. I, pp. 2, 19, *et seq.*

³ *Ancient Law*, p. 18.

⁴ *History of the Roman Law during the Middle Ages*, by Cathcart, p. 2.

⁵ Strange's *H. L.*, Vol. I, p. 256. Mayne's *H. L.*, p. 4.

sense, is generally associated in people's minds with a command or commands of some definite *human authority*, the disobedience to which will be followed by some penalty. This sense, broadly speaking, accords with the meaning generally attached to the term by the jurists, principally, of the school of Austin.

Law, rather, *positive law*, according to Austin, is a rule "set by political superiors to political inferiors."¹ It is "a creature of the Sovereign or State; having been established *immediately* by the monarch or *supreme body*, as exercising legislative or judicial functions; or having been established immediately by a *subject* individual or body, as exercising rights or powers of direct or judicial legislation which the monarch or supreme body had expressly or tacitly conferred."² Practically what Austin means is that law is the express enactments by a Sovereign or a State and certain judicial decisions. Now, this definition of law excludes a large body of rules and customs, collectively termed *unwritten laws*, which existed and regulated the life and conduct of human societies long before any regular political or civil Government came into existence. Austin, holding that until a custom is recognised by a judicial court it cannot become a positive law, has placed these rules and customs under the term *positive morality*. As we shall see later on, Sir Henry Maine does not, and rightly too, agree with this view of Austin.

Holland, who practically adopts Austin's definition of law,³ differs from him in regard to his (Austin's) opinion that a custom becomes a law only when it receives judicial

Its definition
by Austin.

¹ Austin's Juris. Vol. I, p. 1; see also Maine's Village Communities, p. 67.—"A law, they say, is a command of a particular kind. It is addressed by political superiors or sovereigns to political inferiors or subjects; it imposes on those subjects an obligation or

duty, and threatens a penalty (or *sanction*) in the event of disobedience."

² Austin's Juris. Vol. II, p. 221.
³ "A general rule of external human action enforced by a sovereign political authority."—Holland's Juris., p. 37.

recognition. Holland says: "The State, through its delegates, the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these the courts give operation, not merely prospectively from the date of such recognition, but also retrospectively; so far implying that the custom *was law* before it received the stamp of judicial authentication."¹ In giving the recognition a court "merely decides *as a fact* that there exists a legal custom about which there might, up to that moment, have been some question, as there might about the interpretation of an Act of Parliament."²

Holland, though he has proceeded a step further than Austin, in that, custom *was law* before it received judicial recognition, and that, all that the court does is to decide *as a fact* that such custom exists, has not given such a broad definition of law as to include customs. Both customs, that have attained all the force of law, and laws, *i.e.*, statutes, are principles or rules which govern and regulate the life and conduct of human societies. The former have their foundation in the collective will or common consent of the people, just as much as the latter have, on the will or pleasure of a Sovereign or a State. The objects and the functions of both are alike, though the procedure is different. To say, therefore, that customs and usages, which have all the force of law, nay, sometimes even greater force than statutory laws, are not to be called *law*, is a mere verbal contest and nothing else. To give therefore a comprehensive definition of law, so that both customs of the above description and statutes may be included under the term law is not very easy, but yet the following brief description may be considered as adequate. Law is a body of rules of human conduct, either prescribed by long established usages and customs or laid down by a paramount political power.

Comprehensive definition of Law.

Now let us consider the term custom, a correct definition of which may be stated with less difficulty. "At its origin," says Austin, "a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior."¹ A rule of conduct, by uniform series of acts in pursuance of it, turns into a *custom*, which the people observe and follow without any coercion from any body. The rule or rules come into existence without any apparent author. Their birth and growth is the natural consequence of the progress of human society; since no association of persons can exist permanently without adopting, consciously or unconsciously, some definite rules governing reciprocal rights and obligations. These rules of conduct may have been based on utility, or may have arisen from social or communal necessity, but they have always the express or tacit sanction of the collective will or common consent of the people among whom they prevail.² Custom, therefore, may be defined to be a rule of conduct uniformly governing a community from time immemorial.

A custom cannot be created by *agreement* among certain persons to adopt a particular rule so that it may be binding on others.³ A mere *arrangement* by mutual consent for

¹ Austin's *Juris.*, Vol. I., p. 23. Vide *Hurpurshad v. Sheo Dyal*, 3 I. A 259 (1876) : s.c. 26 W. R. 55, wherein the Judicial Committee defined custom as "a rule which in a particular family or in a particular district has from long usage obtained the force of law."

² See Thibaut, *System des Peinlichen Rechte*, p. 15.—"Where a class of persons by common consent have followed a rule intentionally, either by positive or negative acts, a law arises out of the common consent for each person belonging to that class,

provided that the custom is not unreasonable and applies to matters which the written law has left undetermined. A custom, therefore, to hold good in law requires besides the above negative conditions, the following positive conditions, viz., that the majority at least of any given class of persons look upon the rule as binding and it must be established by a series of well-known, concordant, and, on the whole, continuous instances."

³ *Myna Bayee v. Ootaram*, 8 Moore's I. A. 400 at p. 420 (1861);

peace and convenience, or an arrangement which is determinable at the will of any member of the family cannot be regarded as custom of the family.¹

Prescription is not a custom. It, being personal, attaches to a man and his ancestors or to those whose estate he has. Whereas, a custom is, properly speaking, a long-standing local usage.²

Difference
between
Custom and
Usage.

“Custom” and “usage” are not synonymous. In fact, there is a great difference between them. *Custom* carries with it an idea of great antiquity. One of the essential points of a *valid* custom is that it must uniformly exist from time immemorial. No such antiquity is necessary to prove a *usage*. A usage may be of far recent growth, and yet may be proved to be valid. The essential condition regarding its validity is that it must have “fructuated into maturity” and that it must not be *growing*.³ A usage may grow up within a very short period but a custom must have a halo of ages and centuries’ uniformity and consistency attached to it in order to be recognised as such. Usage may be defined to be a uniform practice among a people or class with respect to certain matters or things.

Customs and
Usages grow-
ing up *pari*
passu with
written laws.

Even in these days of codes and statutes, there is still growing up *pari passu* a body of unwritten laws, or, customs and usages, in every sphere of human activity, which commands all the reverence and obedience of a king-made law. Just look at the English constitution. A series of political changes have been made without any

Abraham v. Abraham, 9 Moore's I. A. 195 at p. 242, (1863);

Bhawni v. Maharaj Singh, 3 All. 738, (1881).

¹ *Bhan Nanaji Utpat v. Sundrabai*, 11 Bom. H. C. R. 249, (1874); *Ramrao T. Despande v. Y. M. Despande*, 10 Bom. 327, (1885).

² Stephen's Commentaries, Vol. I., p. 421.

³ Vide *Edward Dalgleish v. Gozaffar Hussein*, 3 C. W. N. 21 (1898); s. c. 23 Cal. 427 (1896) in remand; *Sariatullah Sarkar v. Pran Nath Nandi*, 26 Cal. 184 (1898); *Jagan Prosad v. Posun Sahoo*, 8 C. W. N. 172 (1903).

legislative enactment whatever. A whole code of political maxims has grown up without any aid of the legislature. "We have now," says Freeman, "a whole system of political morality, a whole code of precepts for the guidance of public men which will not be found in any page, either of the statute or the Common Law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right. In short, by the side of our written law there has grown up an unwritten or conventional constitution."¹

Mr. Freeman, in his admirable little work we have just quoted, has given a number of instances illustrating and elucidating his proposition, and we take one or two of them. *First*: the passing of a resolution declaring want of confidence in the Ministers of the Crown. We all know that now this means that the Ministers must resign. But there is no statutory enactment to that effect. The fact that, under such circumstance, the Ministers must resign, rests solely on traditional principles and not on written law. *Second*: the relations of the two Houses of Parliament to one another, the theory of the Cabinet and of the Prime Minister and the practical working of the government—all belong to the unwritten constitution, and not to the written law. *Third*: the British Sovereign has, under the written law, power to select, appoint, and remove from office all his ministers and agents, great and small. But the unwritten constitution makes it practically impossible for a Sovereign, either to keep a Minister in office of whom the House of Commons does not approve or to remove from office a Minister of whom the House of Commons does approve.² Many more instances of the same kind may be given.

As in the region of politics, so in social and domestic,

¹ Freeman's *Growth of the English Constitution*, Chap. III. pp. 112-114. ² Ibid, pp. 118-119.

private and public relations, between man and man, it may be observed that, side by side with written law, there has grown up and is still growing up, silently and without any acknowledged author, a number of customs and usages, precedents and conventions.

Origin and
growth of
custom.

It is impossible to ascertain the precise beginning or to discover the rudimentary growth of an ancient and long established custom. It is of such high antiquity that neither human memory nor historical research can retrace it. Indeed, on its antiquity and immemorial practice depends the goodness of a custom. But though we are unable to trace the origin of a custom which is enshrouded in the mist of ages, yet we can ascertain the process by which a certain rule of conduct is gradually established into a custom.

Let us picture to ourselves for a moment the primitive *aga* of the archaic family when it was ruled by the *paterfamilias*. The head of the family, the father, governs his wife, children and slaves and directs their conduct according to his wishes. The commands or rules in which his wishes are expressed are obeyed by the different members of his family. Whenever the same circumstances arise, the same conduct, as first directed by the rule, is followed. The repetitions of conduct in the various matters of domestic life come at last to be regarded in the family as a rule of conduct or custom. And as years go by, the same rule or custom continues to be observed and with the lapse of years the rule becomes more and more binding, and any attempted departure from it by any member is resented by the rest. In the course of long years, the origin of the custom is lost, how the rule came to be made becomes unknown and unknowable: the members observe it because their ancestors followed it. These rules and principles, few in number, on account of the simple mechanism of an ancient community or tribe, would, though being uniformly followed and acted upon, gradually become inviolable and obligatory. The original tacit

consent of the people on which they were based would gradually crystallize into a collective *will* of the people. And by this *collective will* of the community or tribe those rules and principles would gradually become firmly established as customs.

Custom differs from law in its flexible and plastic nature. This is the inevitable consequence of their respective origin. Law, rather, positive law, originates from the will or command of the Sovereign power, whereas custom has no direct author: it grows and fashions itself as the exigencies of a community arise and need. A law or statute once enacted cannot be altered or repealed by any other power than that of a Sovereign. A custom, on the contrary, may change or modify itself or may be abandoned by a community or a class without the intervention of any authority whatever.

Nature of
custom.

Lord Beaconsfield in his famous speech on the Irish Land Bill observed: "The value of a custom is its flexibility and that it adapts itself to all the circumstances of the moment as of the locality customs may not be as wise as laws, but they are always more popular. They array upon their side alike the convictions and prejudices of men. They are spontaneous. They grow out of man's necessities and inventions, and as circumstances change and alter and die off, the custom falls into desuetude."¹

"The preservation," says Sir Henry Maine, "during a number of centuries which it would be vain to calculate, of this great body of unwritten custom, differing locally in detail, but connected by common general features, is a phenomenon which the jurists must not pass over."² That customs have been handed down to us from the remotest ages and not allowed to pass into oblivion is due to the conservative nature of man and to the reverential regard with which each member of a community or a

How custom
preserved.

¹ Hansard, Vol. 199 p. 1806.

² Village Communities, p. 55.

tribe looks upon them. To violate a custom is to him nothing short of a sacrilege. Thus by right observances and constant practices, the traditional rules have been always kept in evidence and transmitted from generation to generation without any way being warped by extraneous influences. Further, the frequent discussions regarding the various customs among the people themselves, as occasions arise, have tended, in no small measure, towards their preservation.

**Customary
Law.**

A divergence of opinion exists amongst jurists as to what is meant by the expression *Customary Law*. This difference is due to the different conception of the term 'law' by the two different schools in which the jurists have arrayed themselves, *viz.*, the Historical and the Analytical. Hale, Blackstone, Maine and other English jurists and many Roman and German writers representing the Historical School, trace back *law* to before the period when Sovereigns or States came into existence ; whereas Hobbes, Bentham, Austin and others representing the Analytical School, trace law from the period when Sovereigns and States first came into being. Both the Schools, however, agree that, before the king-made law, there existed a large body of rules regulating societies. The Historical School call them *unwritten laws* in contradistinction to the *written* or statutory and judiciary laws. But the School of Austin, as they own the existence of no other law than the king-made one, will not apply the term 'law' to them and prefer to designate them as *unwritten* rules or rules of morality. These unwritten rules or rules of morality, as called by the Analytical School, are collectively called *Customary Law*. It is the *jus non scriptum* of the Romans.

Thus Customary Law,¹ or as it is called, *mores*

¹ Cicero has described Customary Law as "that which without any written law antiquity has sanctioned by the common consent of all men." *De Invent.* 2, 22.

majorum or *consuetudinarium*, is composed of a large body of rules, observed by communities, evidenced by long usages and founded on pre-existing rules sanctioned by the will of the community. It exists independently of a Sovereign authority. It forms the ground-work of every system of legislation.

According to Austin, Customary Law is "positive law fashioned by judicial legislation upon pre-existing customs."¹ Or, in other words, it embraces only those customs which have been recognised by the established tribunals. But the inconsistency of such a definition is quite apparent. In the first place, it excludes a large body of customs which exist with all the force of law, just like those which as a matter of accident having been brought before the court received judicial sanction. In the next place, according to Austin, the moment a custom receives judicial recognition, it becomes part and parcel of the *positive law*, and, therefore, for him to call it again a customary law is simply, if not contradicting, certainly confusing, himself. Lastly, in India, as we shall see presently, a judicial decision or recognition can not confer on custom all the rigidity of a positive law. A custom, though judicially sanctioned, may not be followed at the discretion of courts.

Now let us see what constitutes the binding force of Customary law. The Romans attributed the binding force of customs to a principle of utility (*consensus utentium*) rather than to a religious or reverential respect for the practice of a long line of mythical ancestral gods. The Greeks attributed a divine origin to the customs and usages which had been handed down from their mythical ancestors. In England the weight and authority of a custom depend upon its having been used since the 'time whereof the memory of man runneth not to the contrary.' In India the binding force of customs lies in their sacred

Its binding
force.

¹ Austin's Juris., Vol. I, p. 148; see also *Ibid.*, Vol. II, p. 222.

antiquity and in the reverential obedience to them by the people themselves for generations.

Vangerow says, "just as law is said to derive its force by publication, it is equally correct to say Customary law exists by usage."¹ It will not seem paradoxical to say that the same collective will or common consent of a community that originates a custom, *obliges* every individual member to observe and obey it. Save this there is no other coercive force to enforce obedience. "A custom," says Thibaut, ". . . . is binding in itself, and does not require either the special recognition of the ruling power or its confirmation in Court of Law or the efflux of time, definite or indefinite,—least of all does it require prescription although either of these latter tends very much to prove the existence of the common consent; and from a uniform series of decisions common consent may be inferred."²

According to Austin, however, a custom cannot have a binding force until it has become law by some legislative or judicial act of a Sovereign power. Similar view was expressed in one³ of our early Indian cases, probably on the basis of the view of Austin, but such view is no longer tenable. Holding the view as Austin does, he calls *customs* as nothing more than *rules of morality*. Sir Henry Maine has assailed this view in no measured terms. In dealing with the Indian Village Community he writes thus:—"Those most entitled to speak on the subject deny that the natives of India necessarily require divine or political authority as the basis of their usages; their antiquity is by itself assumed to be a sufficient reason for obeying them. Nor, in the sense of the analytical jurists is there *right* or *duty* in any Indian Village Community; a person aggrieved

¹ 'Lehrbuch der Pandekten' t. I, § xiv.

* Vide, 'Narasammal v. Balaramacharlu, 1 Mad. H.C.R., 420, at p. 424. (1868).

* Thibaut, System der Pandekten Rechte, p. 15.

complains not of an individual wrong but of the disturbance of the order of the entire little society. More than all, the customary law is not enforced by a sanction. In the almost inconceivable case of disobedience to the award of the village council, the sole punishment, or the sole certain punishment, would appear to be universal disapprobation. And hence, under the system of Bentham and Austin, the customary law of India would have to be called morality—an inversion of language which scarcely requires to be formally protested against.”¹

Judicial decisions are not indispensable for the establishment of customary law.² The Courts by recognizing a custom simply declare that it exists as legal and valid custom. Of course, any judicial decision about a certain custom will govern all future cases of like nature or at any rate supply weighty testimony to its existence or non-existence. But such decision is by no means conclusive or absolute. A Court may, in the exercise of its discretion, refuse to follow the past decisions under certain circumstances : as for instance, if a custom which has once received judicial recognition is considered to have become prejudicial to the public interests at some subsequent time.³

Now let us examine what place customs and usages occupy in the Hindu law. There can be no question that the Hindu law, like most other laws, is based on customs and usages. The Code of Manu was by far the earliest attempt at a compilation of the then prevalent customs and usages, though it contained but a very small body of such customs and usages. They have been long since recognized as a branch of Hindu law by the British Courts here as well as by the Judicial Committee. Writers on Hindu law have, one and all, declared that the law is based on immemorial customs. These customs, wherever they

Custom as a source of Hindu law.

¹ Village Communities, p. 68.

² *Muthura Naikin v. Esu Naikin*,

³ Vide, *Tara Chand v. Reeb* 4 Bom. 545 (1880).

Ram, 3 Mad. H. C. R. 50 (1866).

prevail, "supersede the general maxims."¹ Manu says, "the whole Veda is the first source of the scared law, next the traditions and the virtuous conduct of those who know the (Veda further), also the *customs* of holy men, and (finally) self-satisfaction."² This injunction helped in a considerable measure in rendering the customs and usages prevalent in India so stable and firm.

Code of
Manu.

The Code, or Laws, or Ordinances, or Institutes, of Manu, as they are variously called, are, as we have said, the earliest attempts among the Hindus to fix ancient customs and traditions in a systematic form. The Code is, at best, only a large collection of "the usages of a peculiar tribe of the country" and a compendium of "moral and religious duties and precepts to pious Hindus." This compilation or Code of Manu dates back, according to various authorities,³ from the thirteenth to the third century before the Christian era. Whatever the age of the *magnum opus* may be, it is now beyond all shadow of a doubt that it is the earliest record we possess of Indian customs and usages existing from time immemorial. Whether or not the present Code of Manu is the original work of the author whose immortal name it bears we need not stop here to discuss. It is sufficient for our purpose to say that the original compilation of Manu must have suffered mutilations and interpolations, modifications and alterations at the hands of the glossa'ors, and under the later school of Brahmanism, as, in accordance with the general principle of progress and advancement, the needs of the growing communities demanded.

"The Hindu Code, called the Laws of Manu," observes Sir Henry Maine, "which is certainly a Brahmin compila-

¹ Strange's H. L., Vol. I. p 251.

at about 900 B. C.; Prof. M.

² See *Infra*, p. 15.

Williams, at about the 5th Century

³ Sir William Jones places its age at 1200 B. C.; Schlegel, at about 1000 B. C.; Elphinstone,

B. C.; Prof. Max Müller, at a date

not earlier than 200 B. C.—*Vide*

Mayne's H. L., p. 19.

tion, undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be law."¹ Again : "The Codified law—Manu and his glossators—embraced originally a much smaller body of usage than had been imagined, and, *next*, that the customary rules, reduced to writing, have been very greatly altered by the Brahmanical expositors constantly in spirit, sometimes, in tenor."²

That Manu recognised the vast importance of customs and usages will be found from the following passages quoted from Prof. Max Müller's 'Laws of Manu.'

CHAPTER I.—108. The rule of conduct (usage, আচার, शील) is transcendent law, whether it be taught in the revealed texts or in the sacred tradition ; hence a twice-born man who possesses regard for himself should be always careful to (follow) it.

CHAPTER II.—6. The whole Veda is the (first) sourcee of the sacred law, next the traditions and the virtuous conduct of those who know the (Veda further), also the customs of holy men and (finally) self-satisfaction.

„ —12. The Veda, the sacred tradition, the customs of virtuous men, and one's own pleasure, they declare to be visibly the four-fold means of defining the sacred law.

„ —18. The custom handed down in regular succession (since time immemorial) among the (four chief) castes (Varna) and the mixed (races) of that country, is called the conduct of virtuous men.

¹ Ancient Law, p. 17.

² Village Communities, p. 52.

³ Sacred Books of the East, Vol.

XXV.

CHAPTER II.—20. From a Brahmin, born in that country, let all men on earth learn their several usages.

CHAPTER IV.—155. Let him, untired, follow the conduct of virtuous men, connected with his occupations, which has been fully declared in the revealed texts and in the sacred traditions (Smriti) and is the root of the sacred law.

—156. Through virtuous conduct he obtains long life, through virtuous conduct desirable offspring, through virtuous conduct imperishable wealth; virtuous conduct destroys (the effect of) inauspicious marks.

—178. Let him walk in that path of holy men which his fathers and grandfathers followed; while he walks in that he will not suffer harm.

CHAPTER VIII.—41. (A King) who knows the sacred law, must enquire into the laws of castes (gati), of districts, of guilds, and of families, and (thus) settle the peculiar law of each.

—46. What may have been practised by the virtuous, by such twice-born men as are devoted to the law, that he shall establish as law, if it be not opposed to the (customs of) countries, families, and castes (gati).

Manu went further and enjoined the Kings, after they have conquered a new country, to uphold the customs of the conquered country. (Vide Manu, Chapter VII, 203).

A few quotations from the later commentators will show that they also laid stress on the authority of customs and usages in their respective works. We do not desire to quote from every one of the leading commentators whose names are familiar to the students of Hindu law, but we need only mention Gautama, Vasistha, Apastamba, Yajnavalkya, Narada, Vrihaspati, and Katyayana. To exemplify, we quote the following texts from some of these authors.

Gautama—CHAPTER X. 19-20. The laws of countries, castes, and families, which are not opposed to the (sacred) records (have) also authority. Cultivators, traders, herdsmen, money-lenders, and artizans, (have authority to lay down rules) for their respective classes.

Vasistha—CHAPTER I. 17. Manu has declared that the (peculiar) laws of the countries, castes and families may be followed in the absence of (rules of) the revealed text.

Yajnavalkya—CHAPTER I. 343. Whatever customs, practices and family usages prevail in a country they should be preserved intact when it comes under subjection.

Narada—CHAPTER I. 40. In case of conflict of Smritis decision should be based on reason. Custom is powerful and overrules the sacred law.

Krihaspati—Book II. Ch. iv, V. 17 (cited in the *Vyavaharatatwa*) :—

A decision must not be made solely by having recourse to the letter of written codes ; since, if no decision were made according to the reason of the law, or according to immemorial usage (for the words *yucti* admits both senses), there might be a failure of justice. *Raghunandana*.

Vachaspati and *Raghunandana* cite the following from the *Vamana Purana* :—A man should not neglect the approved customs of districts, the equitable rules of his family or the particular laws of his race.

In whatever country, whatever usage has passed through successive generations, let not a man there disregard it ; such usage is law in that country.¹

See Colebrooke's Digest of Hindu Law, pp. 137, 162.

Influence of
Brahmanism
on customs.

It is important to consider the influence of Brahmanism, which is of later development, on the then existing customs. History tells us that the first country in which the Aryans settled was the tract of land drained by the great river Indus and its tributaries. The holy land of *Brahmavarta* was, as described by Manu,¹ situated between the two ancient rivers, Sarasvati and Drisadvati in the Punjab, and this *Brahmavarta*, according to that sage, is the land where "the custom handed down in regular succession (since time immemorial) among the (four chief) castes of that country is called the conduct of the virtuous men."² Manu further says "from a Brahmin in that country let all men on earth learn their several usages."³ It is worth noting that Manu has throughout his treatise enjoined unqualified reverence for, and implicit obedience to, the Brahmans, and placed them, as a class, above all other human beings. The Brahmans, armed with such *shastric* injunctions, assumed for themselves the position of sole interpreters of the Vedas and Shastras, and became the expositors of usages and customs, both secular and religious, and ultimately attained an ascendancy even higher than that of the rulers of the soil. It was through their influence that ancient customs and usages, which had originally been free from any religious significance or superstitious ideas, became clothed with all sorts of religious rites and superstitions.

But whatever may have been the influence of Brahmanism in modifying the customs and usages of the country where it became paramount, there exists a large body of customs and usages, absolutely pure and untouched, amongst the indigenous population of India who were unaffected by Brahmanism. Even in the Punjab, the birth-place and cradle of Brahmanism, the ancient customs and usages did not suffer much change. Because, soon

¹ Laws of Manu, Chap. II, 17.

³ *Ibid.* Chap. II, 20.

² *Ibid.* Chap. II, 18.

after the Aryans began to move further eastward, the hold of Brahmanism slackened to a considerable extent. In Southern India also, the Brahmans never settled in sufficient numbers to produce a lasting effect on the existing customs and usages. Consequently, in Malabar, Canara, and among the Tamil inhabitants of the South of India, and the Nambudri Brahmans on the West Coast of the Madras Presidency, certain peculiar usages and customs are noticed which remained uninfluenced by Brahmanism.

The case of the Nambudri Brahmans is very singular. They belong to the same stock as the Aryans who invaded and conquered India and subsequently settled in it. They, however, separated themselves from the main stock before Brahmanism had been fully developed, and went to settle in Malabar. Naturally, their usages and customs were not affected by Brahmanism. But the singularity lies in the fact that though they have been in Malabar over 1200 or 1500 years, their customs have not been modified or influenced by those of the people among whom they have lived so long. They have retained their old customs and usages unchanged. The customs and usages which prevail among the Nambudri Brahmans of the present day are the same as existed among the Brahmans of Eastern India at the time of their emigration. Their archaic character exactly accords with such a conclusion.¹

The Village Community and the Panchayet are two institutions which were instrumental in producing and preserving many customs. The former is the older of the two and "is to be found in every part of the world where men have once settled down to an agricultural life." The Indian village system had its foundation in the communal principle, the essential features of which are that, whilst the individual house-holder may be the supreme

Village Com-
munity and
Panchayet.

¹ Vide, *Vasudevan v. Secy. of State*, 11 Mad. 157 at pp. 180, 181.

head of his own family, he is still bound, as a member of the community, irrespective of his creed or caste, to strictly conform to the village rules and usages regulating the internal economy or administration of the whole community. In the Punjab and the adjoining districts this village system is still found in its primitive vigour. Similarly this system is also prevalent among the Dravidian races in the South and among the Nairs of Malabar and Canara. These communities have not been affected by the Brahmanic innovations, and, as a result, have handed down their customs and usages unchanged and unmodified. Among the Hindus of the Punjab, for instance, the order of succession is determined by custom and not by religious considerations. The right of pre-emption, another village custom, is to be found in the Punjab, and is now recognised by Statute. The Tamil settlers of Northern Ceylon retain many of their ancient customs, unaltered by Brahmanic influence owing to causes which cannot now be ascertained.

The Punchayet, or the Council of Village Elders, is an institution of comparatively modern times. Elderly men of the village formed its members, managed the affairs of the community, interpreted customs and settled all disputes. The Elders made no new rules but interpreted the meanings thereof. They declared what the rule of custom was, as the judges in England even now declare what the Common law is. The Punchayet possessed no power to alter any peculiar order of succession immemorially observed. It had nothing to do with any matter involving private rights except merely declaring what had been the custom of that particular family or locality in regard to them. Its chief functions lay in settling civil or municipal rights of individuals in relation to neighbours. As the authoritative interpreter of customs and usages, the Punchayet settled and adjusted the various disputes between private individuals. This course of procedure naturally tended to the rigid observance of a

body of customary rules which being traditionally handed down to posterity acquired a force in proportion to the frequency of its recognition and application. But it must not be forgotten that by these very interpretations and declarations the old rules and customs came insensibly to be modified and altered to suit the times, and so the changes and modifications went on from age to age. When, however, records came to be made of such interpretations and declarations, the gradual modifications of the ancient rules and customs naturally ceased.

The first stage in the evolution of the human race, after the primitive state, is what is known as the *heroic* or *military* age. At this stage of humanity, the King used to be regarded as a divine agent, and whatever he did or said was looked upon as imbued with direct divine inspiration. Not Kingship alone, but every cardinal institution of the age, in fact, was supposed to have existed under supernatural presidency. The heroic age was succeeded by an *era of aristocracies*. During this age, the kingly rule was supplanted by that of oligarchies. The sacredness of the kingly character having become weakened, the dominion of aristocracies sprang up. It is not only in Europe but also in India that these oligarchies of aristocracy came into existence. Here the aristocracies became religious, whereas in Europe, they were civil or political. These aristocracies were universally the depositaries as well as the administrators of law. They claimed to monopolise the knowledge of law, to have the exclusive possession of principles by which disputes were to be settled and civil rights adjusted. This period, according to Sir Henry Maine, is the period of Customary Law. "Customs or observances," he observes, "now exist as a substantive aggregate and are assumed to be precisely known to the aristocratic order or caste."

We remarked while dealing with the influence of

Origin of
customary
law in the
aristocratic
period.

Brahmanism, that at one time Brahmanism or the sacerdotal order became a paramount power in the land of the Hindus. It was at this period that a body of customary laws grew up in India. The period of the sacerdotal order or Brahmanism in India corresponded with that of aristocracy in Europe. And like the aristocracy of Europe, the hierarchy of priesthood in India became the depository and custodian of customs and principles regulating the whole society. "The epoch of Customary law and of its custody by a privileged order," says Sir Henry Maine, "is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world."¹

In the history of jurisprudence this period of customary law was succeeded by the Era of Codes or written laws like those of the Twelve Tables of Rome, the Attic Code of Solon, Laws of Draco, or the Laws of Manu.

Special importance of customary law in India.

In India, as it is generally admitted, Government by legislation, in the modern sense of the expression, is of very recent date. The Hindu rulers and chiefs of various provinces never made any serious attempt to rule their respective states or dominions by legislation. They never framed a code of laws regulating purely private rights. They did not attempt to interfere with the diverse social and domestic rights, duties and interests (like marriage, adoption, succession, &c.) of the people over whom they held their sway. It would seem that all these domestic and social matters were severely left to be shaped and moulded by the people themselves or, rather, by accidents. The people, no doubt, guided themselves in these matters by rigidly following their ancient customs

and traditions, which the practice of their forefathers consecrated in their eyes. So far, therefore, as India is concerned the importance of customary law is very great indeed.

It is worthy of note that by the Act of the British Parliament, 21 Geo. III, c. 70, s. 17, and by the Indian Regulation IV of 1793,¹ s. 15, the customs and usages of this country were early recognised and all the British courts in India were required, in determining questions of civil rights and status in cases between Indians, to decide according to such customs and usages. Both these Statutes provided that in suits regarding inheritance and succession to lands, rents and goods, marriage, caste and all other matters of contract and dealing between party and party the laws and usages of Hindus, in the case of Hindus, the laws and usages of Mahomedans, in the case of Mahomedans, should be observed by the Judges in coming to a final decision. Shortly after, the Privy Council, in their decisions of cases, solemnly declared that "under the Hindu system of law clear proof of usage will outweigh the written text."² The legislatures of the different Indian Provinces have, whenever necessary, always provided a saving clause in the Acts passed by them guarding the observance of the customs and usages of the country whether of a family, of a tribe, or of a district, so that the judicial officers may in deciding cases give effect to the ancient customs and usages of the people.³

¹ *Vide* Act XII of 1887, s. 37 which has been substituted for s. 15 of the Regulation.

² *Vide Collector of Madura v. Moottoo Ramalinga Sathupathy*, 12 Moo. I. A. 397, at p. 436 (1868); *Bhyah Ram Singh v. Bhyah Ugur Singh*, 13 Moo. I. A., 373 at p. 390 (1870); *Matangini Debi v. Jaykali Debi*, 5 B. L. R. 466 at p. 469. (1869).

³ *Vide* Bombay Reg. IV of 1827, s. 26.

Act II of 1864, s. 15.
Burma Act XVII of 1875, s. 5.
Central Provinces Act XX of 1875, s. 5.

Madras Act III of 1873, s. 16.
Oudh Act XVIII of 1876, s. 3.
Punjab Act XII of 1878, s. 1.
Burma Courts Act XI of 1889, s. 4.

Incidents of
Customary
Law.

Whenever a custom is pleaded and proved to exist, and if it be not repugnant to public interests or abhorrent to public morality, and if it satisfies all the requisites of a good old custom,—such a custom is “entitled to receive the sanction of a court of law.” Nay, it will out-weigh the written texts of law and supersede the general law.¹

Requisites of
custom.

We will now consider what are the requisites of a valid custom. In order that a custom may have the force of law, it is necessary that it should be *ancient* and *invariable*, *continuous* and *uniform*, *reasonable* and not *immoral*, *certain* and *definite*, *compulsory* and *consistent*.² In *re Sivananjan Perumal v. Muttu Ramalinga*³ the learned Judges made the following observations :—“ What the law requires before an alleged custom can receive the recognition of the court and so acquire legal force is satisfactory proof

Arakan Hills Reg. VIII of 1876,
s. 5.

Terai Reg. IV of 1876, s. 5.

Ajmere Reg. VI of 1877, s. 4.

Indian Contract Act IX of 1872,
ss. 1 and 110.

Indian Trusts Act II of 1882, s.
1.

Bengal Tenancy Act VIII of
1885, s. 183, *et passim*.

Oudh Land Revenue Act XVII
of 1876, s. 31.

N. W. P. Rent Act XII of
1881, s. 29.

&c., &c., &c.

¹ *Vide Perry's O. C.*, p. 121. *Sunder v. Khuman Singh*, 1 All. 613 (1878); *Mahomed Sidick*, 10 Bom. 1 (1885); *Bhagirithibai*, 11 Bom. 285, (F. B.) (1886); *Desai Ranchhoddas Vithaldas*, 21 Bom. 110. (1895).

² *Huro Prasad v. Sheo Dyal*, 26 W.R. 55 (1876); s. c. 3 I. A. 259; *Rajkishen Singh v. Ramjoy Surma Mozoomdar*, I. Cal. 186 (P.C.); s.c. 19 W.R. 8 (1872); *Mathura Naikin*

v. *Esu Neikin*, 4 Bom. 545 (1880); *Sivananjan Perumal v. Muttu Ramalinga*, 3 Mad. H. C. R. 75 (1866); *Raja Koenarain Roy v. Dhorinidhur Roy*, S. D. Decis (1858), p. 1132; *Sumrun Singh v. Khedun Singh*, 2 S. D. Sel. Rep. 116 (147) (1814); See also *Joy Kishen Mookerjee v. Doorga Narain Nag*, 11 W. R. 348 (1869); *Amrit Nath Chowdhry v. Gowri Nath Chowdhry*, 6, B. L. R. 232 (P.C.) at p. 238; (1870); *Ramchurn Mujmooddar v. Rajah Bishwanath Singh*, 12 S. D. Decis 399 (1856); *Soarendronath Roy v. Heeramnee Burmoniah*, 12 Moo. I.A. 81 (1868); *Patel Vandra Van Jekisan*, 16 Bom. 470 (1891); *Lutchmiput Singh*, 9 Cal. 698 (1882); *Bhan Nanaji Utpat*, 11 Bom. H. C. R. 249 at p. 271 (1874); *Tara Chand v. Reeb Ram*, 3 Mad. H. C. R. 50 at p. 57, (1866).
³ 3 Mad. H. C. R. 75, at p. 77, (1866).

of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country ; and the course of practice, upon which the custom rests must not be left in doubt but be proved with certainty." This case came on appeal before the Privy Council, and their Lordships in affirming the judgment of the Madras High Court made the following remarks:— "Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India; but it is of the essence of special usages, modifying the ordinary law of succession, that they should be *ancient* and *invariable*: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of *antiquity* and *certainty* on which alone their legal title to recognition depends."¹ A custom should not only be ancient or immemorial, but it should have been exercised in a *uniform* manner. (*Vetutissima et jugiter observata*). A custom being irrational, absurd, and contrary to equity and good conscience cannot be sustained in a court of justice.² A custom set up must be *definite*, so that its application in any given instance may be clear and certain and reasonable.³ A custom to be valid must be consciously accepted as having the force of law.⁴

¹ *Ramalakshmi Ammal v. Sivanantha Perumal*, I. A. Supp. 1 at p. 3. (1872) : s. c., 17 W. R. 553 (P. C.)

² Vide *Indur Chunder Dugar v. Lachmi Bibi*, 7 B. L. R. 682 (1871) : s. c. : 15 W. R. 501.

³ *Lachman Rai v. Akbar Khan*, 1 All. 440 (1877) ; *Lala v. Hira Singh*, 2 All. 49 (1878); *Harpurshad v. Sheo Dyal*, 3 I. A. 259, at p.

285^{*} [1876] ; *Ramalakshmi Ammal v. Sivanantha Perumal* I. A. Supp. 1 (1872) : s. c. 17 W. R. 553 (P. C.) : *Doorga Pershad Singh v. Doorga Kowreee*, 20 W. R. 154 at p. 157 (1873) : *Bhogawan Das v. Balgolind Singh*, 1 B. L. R. (S. N.) IX. (1868).

⁴ *Mirabici v. Vellayanna*, Mad. 464 (1885).

Stephen, in his Commentaries,¹ has enumerated certain conditions that are necessary to make a special custom good and these are :—

(i) The custom must have been used *so long, that the memory of man runneth not to the contrary.*

(ii) A custom must have been *continued*. Any interruption would cause a temporary ceasing ; revival would give it a new beginning, which would be *within* the time of legal memory, and therefore the custom will be void. But this must be understood with regard to an interruption of the *right*; for a temporary interruption of the *possession* only will not destroy the custom. But if the *right* be any how discontinued, even for a day, the custom is quite at an end.

(iii) A custom must have been enjoyed *peaceably*, and not subject to contention and dispute.

(iv) A custom must be *reasonable*; or, rather, taken negatively, it must not be unreasonable.

(v) A custom ought to be *certain*.

(vi) A custom, though established by consent, must (when established) be *compulsory*; and not left to the option of every man, whether he will use it or no.

(vii) Lastly, customs must also be *consistent* with each other; one custom cannot be set up in opposition to another.

Both the Hindu and the Roman jurists required that the usage or custom should be *immortal*. But neither of them laid down any specific rule for determining precisely either the length of time or the exact number of repetitions necessary to constitute such an *immortal* custom. In England the rule is that the usage must be so ancient that it must have existed ‘from time whereof the memory of man runneth not to the contrary.’ This hypothetical period, which is, in jurist’s language, known as *legal memory* in contradiction to *living memory*, has been fixed,

arbitrarily no doubt, *anterior* to the first day of the reign of Richard I. (1199 A.D.); the *living memory* being computed from the first day of Richard I.'s reign. The reason why the reign of Richard I. was accepted as the extreme limit of living memory is because from his reign the records of all the legislative enactments have been preserved, and all traces of parliamentary legislation prior to his reign have been lost.

The principle laid down by Grey, C. J., by way of analogy to the English legal memory, is to be found in a reported case of the then Supreme Court of Calcutta and is worth quoting. The judgment was delivered on the 21st November, 1831. His Lordship observed as follows:—

"I have no hesitation in saying, that we are bound to take notice of any special customs which may exist among the Hindoos, or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindoos.....It may be said that from the year 1756 to the year 1765, there was a double Government in this country, and during which period there was no registry of any Regulations. To those who minutely study the history of that period, it must be evident, that many usages were then introduced, that are now recognised as Hindoo customs, and if any of the usages which were introduced at that period are relied upon as Law, we are bound to take notice of them, should it be shown to us, that they have become written Law of the land, but even if they have not become the written Law, and they are specially pleaded, we must still recognise them as a valid subsisting custom, on the presumption, that this custom had its origin in some lawful authority, and there will be no more difficulty in doing this, than there is in recognising the local customs of England. Although in this

country we cannot go back to that period which constitutes legal memory in England, *viz.*, the reign of Richard I., yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta I should say, that the Act of Parliament in 1773, which established this Court, is the period to which we must go back to found the existence of a valid custom, and that after that date, there can be no subsequent custom, nor any change made in the General Laws of the Hindoos, unless it be by some Regulation by the Governor-General in Council, which has been duly registered in this Court. In regard to the Muffasil, we ought to go back to 1793, prior to that, there was no Registry of the Regulations, and the relics of them are extremely loose and uncertain. I admit that a usage for 20 years may raise a presumption, in the absence of direct evidence of a usage, existing beyond the period of legal memory.

"In administering Hindu Law in this Court, there are four distinct authorities which we are bound to recognise.

1st. A usage in accordance with the *Sastra*, contained in the *Smritis* or original Text Books.

2nd. A usage in accordance with the *Dharma Sastra* being the works of the Commentators.

3rd. English Acts of Parliament.

4th. Usages in Calcutta prevailing previous to 1774, and in the Muffasil previous to 1793, as their existence for that length of time presumes, that they were established by Acts of Sovereign Authorities."¹

Thus in Calcutta 1773 is the period which constitutes legal memory, and in the Muffasil, 1793. These are the periods to which we must go back in order to establish the existence of a valid custom. But a custom for twenty years may raise a rebuttable presumption of the custom existing beyond the period of legal memory.

¹ *Doe d. Jagomohan Rai v. Clarke's Rules and Orders of the Srimati Nimm Dasi, Montrion's Supreme Court of Judicature in Cases of Hindu Law*, p. 596. Fort William, p. 112.

In *re Garurudhwaja Parshad Singh v. Saparandhwaja Parshad Singh*¹ it has been held by the Privy Council that the evidence of unbroken custom for eighty years, since the British occupation of that Province, is sufficient. A family custom cannot be binding where the estate to which it is alleged to attach is so modern as to preclude the possibility of any immemorial usage.²

It should be noted that this rule of immemorial antiquity is to be restricted to *custom* only and not to usage. As we have already stated a usage may be of quite recent growth yet, if established, will be valid.

From the first few lines of the passage we have quoted from the judgment of Grey, C. J., it is clear that the British Courts are bound to take notice of any special customs that may be pleaded. In the concluding lines his lordship has laid down that in administering Hindu law the British Courts are bound to recognise authorities of usage—usage as contained in the *Smritis*, usage as mentioned by the Commentators, and usage existing anterior to legal memory as fixed by his Lordship. The Judicial Committee in the celebrated *Ramnud* case,³ observed : “The duty of an European Judge, who is under the obligation to administer Hindoo law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage.” By the Charter Act, the Supreme Courts of Calcutta, Bombay, and Madras were directed to determine cases by the laws and usages of Gentoos and Mahomedans.⁴ And in numerous decided cases it has been laid down that the function of the Court is to ascertain, to compare, to explain, and to ratify, and not to

¹ 27 I. A. 328 (1900).

² *Collector of Madura v. Moottoo*

³ *Umritnath Chowdhry v. Ramalinga Sathaupathy*, 12 Moo. I. *Goureenath Chowdhry*, 13 Moo. I. A. 397 at p. 436 (1868).

I. A. 542 (1870);

⁴ *Vide Charter Act, s. 17.*

create a custom. A Judge, as a witness and as an expositor, has to give a clear definition of the custom, usage or rule as to which the opinion of the community has arrived at the requisite degree of maturity.¹

It should be noted that it is as much a Court's duty to abrogate or veto a bad, immoral or illegal custom as to sanction or ratify a good one. No doubt, a Court is bound to give recognition to any custom or usage proved to its satisfaction ; still it possesses a very wide discretion in not recognising a custom which is prejudicial to public interests, or repugnant to public morality, or in conflict with the express law of the country.²

Custom
may be
abandoned.

That a custom may be abandoned is now beyond all shadow of a doubt. The Privy Council have, in at least two very important cases,³ pronounced so. In the last case their Lordships said that they "can not find any principle or authority for holding that, in point of law, a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes ; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It

¹ *Mathura Naikin v. Esu Naikin*, 4 Bom. 545, p. 559 (1880). *Utpat v. Sundrabai*, 11 Bom. H. C. R. 249 (1874) ; *Adryapa v. Rudrava*, 4 Bom. 104 (1879).

² *Vide Mathura Naikin*, 4 Bom. 545 (1880) ; *Basava v. Lingan-gauda*, 19 Bom. 428, p. 459 [1894] ; *Khojah's cases*, Perry's O. C. 110 ; *Tara Chand v. Reeb Ram*, 3 Mad. H. C. R. 50 (1866) ; *Bhan Nanaji Abraham v. Abraham*, 9 Moo. I. A. 195 (1863) : s. c. 1 W. R. 1 ; *Rajkishen Singh v. Ramjoy Sirmah Mazoomdar*, 1 Cal. 186 at p. 195 (1872) : s. c. 19 W. R. 8.

would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon.”¹

West, J., in *re Mathura Naikia*,² following these Privy Council decisions, has remarked that judgment in accordance with a usage as existing does not imply, of necessity, either that it always has existed, or that it always must exist, so as to limit the operation of the Statute. A change in the popular conviction may, without inconsistency, be followed by a change in the course of the decisions by which the Legislature intended to reflect them.

In *re Abraham v. Abraham*, the Privy Council have said that customs and usages dealing with property, unless their continuance is enjoined by law, may, as they are adopted voluntarily, be changed or lost by disuetude. In *Soorendra-nath Roy v. Heeramonee Burmoneah*,³ their Lordships, following *Abraham v. Abraham*, observed “whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed equally, as to both.”

In a country where the law is fixed, such as in the civilized countries of the world, the law governing the devolutions of land is also settled; so that a person coming to live in such a country and acquiring land will be governed with regard to his immoveable property by the settled law of the land, that is, the *lex loci*. On his death his real estate will be inherited by his relations according to the *lex loci*, and not according to the law of the land from whence he came. But in India there is no *lex loci* governing immoveable property; matters relating to property being governed by the law of one's own personal *status*. Among the Hindus in India there are several distinct schools or systems which operate in different

Migrating Families.

Rajkhen Singh v. Ramjoy Surmah Mazoomdar, 1 Cal. 186, p. 195 (1872).

¹ 4 Bom. 545 at p. 561 (1880).

² 12 Moo. I. A. 81 at p. 91 (1868); s. c. 10 W. R. 35 (P. C.). See *Vanku v. Mahalinga*, 11 Mad. 393, p. 400 (1888).

provinces. As for instance, a Hindu of Bengal is governed by the *Dyabhaga*; of Behar, Northern India, Marhatta Country, and Northern Canara, by the *Mitakshara*; of Madras, by the *Smriti Chandrika*; of Poona, Ahmednagar and Khandesh, by the *Mayukha* and so forth. Except in Bengal, the system of *Mitakshara*, however, practically prevails in all other provinces, although the special authorities mentioned as prevailing in them have also a considerable weight. But whether it be the *Dyabhaga* or *Mitakshara* that may prevail in a place, the law is not merely a *local* law but also a *personal* law, and becomes part of the *status* of every family which is governed by either school. Consequently, when any such family migrates to another province, governed by a different school of law, it carries with it its own law.¹ Thus if a family governed by the *Dyabhaga* in Bengal comes and settles in a place where the *Mitakshara* prevails, it will not be governed by the *Mitakshara* but by the *Dyabhaga*. And this rule will apply not merely in respect of succession and inheritance to landed properties but also in matters of personal relationship of the members of the family. This is quite unlike the general rule that obtains in other countries, according to which, *lex loci* governs matters relating to land and the law of domicile governs personal relations.

The above principles are also applicable to families which have acquired any special custom of succession differing from that either of their original or acquired domicile. The same rule applies to a family which has changed its status.²

Buddhist
Customs.

Beyond some vestiges of the great religion of *Gautama* very little is to be found in India of the Buddhistical customs and usages. When *Buddha* was born, *Brahmanism*

¹ See *Vasudevan v. Secy. of State*, 11 Mad. 157, p. 162 (1884); *Soverendranath Roy v. Heeramonee Burmoneah*, 12 A. 132 (1839).

² Vide *Rutcheyatty Dutt Jhu v. Rajender Narain Rac*, 2 Moo. I. A. 81 (1868).

was in its ascendancy. But the teachings of *Buddha* soon succeeded in checking the tide of *Brahmanism*. The wide and rapid spread of *Buddhism* once threatened the existence of *Brahmanism*. But luckily for the latter, the great *Sankaracharya* appeared at an opportune time to preach his doctrine of *Vedantism*. His teachings not only retarded the progress of *Buddhism*, but soon resuscitated *Brahmanism*, and eventually expelled *Buddhism* from India. *Buddhism*, thus arrested and expelled from its native soil, found a congenial field in Ceylon, Arakan, Burma, China, and Tibet, where it has since taken root and become the religion of the people of those countries.

It is said that Burma was originally colonized by the Hindus and that the *Buddhist* religion was introduced there in the second century of the Christian era. Like the Hindu Code of Manu, the Burmese *Dhammathats* embody rules and principles, customs and usages, relating to social and religious, public and private rights,—the traditions, as it is said, from the foundation of the world, beginning from King Maha Thamada. The *Dhammathats*, in their origin, are Indian and *Brahmanical* and not Burmese or Buddhistical; they have, however, been greatly modified by the Buddhist religion. The original *Dhammathats* are in Sanskrit or Pali and have been translated into Burmese. Up to 1847 these books existed only in the form of palm leaf manuscripts. In that year Dr. Richardson, Principal Assistant to the Commissioner, Tenasserim Provinces, published at Moulmein an edition in Burmese, with translation into English, of the *Menu Kyay Dhammathat* and from that time it has been the sole book of reference. Mr. Jardine, late Judicial Commissioner of Burma, has, in his "Notes on Buddhist Law," translated some portions of other *Dhammathats* relating to marriage, divorce, and inheritance. According to Mr. Jardine "The *Menu Kyay* is fuller than most of the *Dhammathats*. But in the present dearth of learning it is as difficult to appraise its authority as to determine its age, or the name of the

author . . . it is probably a compilation made from the *Dhammathats*."

All jurists agree that the marriage laws of a nation depend on the social, moral and religious ideas of the people. As regards the Burmese, it will be observed that round the central ideas of marriage, customs governing real and personal property, and its devolution and partition, range themselves. The *Dhammathats* recognise the custom of polygamy. In Lower Burma it has prevailed so universally and for so long a time that it has acquired the force of law.¹ The Burmese had, like the Indians, their *Punchayet*. It was composed of Elders or *Loogyees* who settled all questions of divorce, inheritance and partition of property, according to the customs and usages laid down by Menu, the recluse.

The Government of India in legislating for the Courts in Burma have recognised the rules and customs of the Burmese as will appear from the Burmese Courts Act XVII of 1875. Sec. 4 is as follows:—²

"Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist law in cases where the parties are Buddhists . . . shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of law in British Burma.

"In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience."

In 1860 Major Sparkes found a Code of Burmese Law combining the written law as found in the *Menu Kyay* with the *lex loci* or local custom. Besides *Menu Kyay*,

¹ *Ma In Than v. Meung Saw Hla*, Civil Refee. No. 1, 1880, decided on July 20, 1881.

² See *Mi Nu v. Maung Saing*, Civil Appeal, June 24, 1874, per Sandford, J.

there are numerous rulings of the special Court and the Judicial Court of the Commissioner of Burma. All these rulings have authoritatively decided many doubtful points in Buddhist Customary Law.

Among the Karens, Chins and other hill tribes, peculiar customs obtain and these customs differ from those of the Burmese.

So far as India is concerned the importance of Customary Law has more reference to the Hindus than the followers of Islam. Yet, it is not a fact, as is generally supposed, that custom has no place in Mahomedan jurisprudence. No doubt the two principal sources of Islamic law are the *Koran*, as containing the words of God, and the *Sunna* or traditions, being the inspired utterances of the Prophet of Arabia and precedents derived from his acts. Next in authority, as is well-known, are *Ijma* or consensus of opinion among the learned and *Qiyas* or analogical deductions from the above three. But the same texts upon which *Ijma* is founded have led to the recognition of custom or *Urf* as an independent source of law. Indeed, the Prophet himself in his life-time recognised the force of customary law, as in many instances he either gave his express sanction to certain pre-Islamic usages prevalent among the Arabs or suffered such usages to continue without any expression of disapprobation. His companions after his decease similarly recognised many customs which were not inconsistent with the teachings of the Islamic faith. With the progress of time when the Mahomedans spread over different countries and included a variety of races the area of customary law became widened. The principle that regulates the validity of custom or usage in Mahomedan jurisprudence is that it must not be opposed to a clear text of the *Koran* or the *Sunna*. Otherwise it is broadly laid down that usage obtaining in a particular country among Mahomedans overrides any rule of law based on analogical deduction. It is further stated that a custom, to have the force of law in Mahomedan jurispru-

Mahomedan
Customs or
Urf.

dence, need not be general. Again, a custom has force and effect only in the age and the country in which it flourishes.

A Full Bench of the High Court of the North-West Provinces has ruled that where a family has professed the Mahomedan religion for successive generations, the Courts in this country, on the occasion of a claim to succession being met by a plea of social usage, are bound to dispose of the case under the Mahomedan law, and cannot recognise any such plea of usage which is opposed to the Mahomedan law.¹ The Privy Council in a case referred to this question as one which had not till then been settled. And although it was unnecessary to decide it in that case, their lordships used language which clearly indicated, that, in their opinion, it was doubtful whether Mahomedan law did admit of any control by custom.² The Chief Court of the Punjab, however, in a case, held that by special family custom the females of a certain family were excluded from inheritance. The Court felt itself bound to give effect to this custom under provisions of Act IV of 1872.³

Act IV of 1872 has been amended by Act XII of 1878, which provides that questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions or any religious usage or institution shall be decided according to any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by competent authority.⁴ Similar provisions have been made in *Oudh*,

¹ *Surmust Khan v. Kadir Dad Khan*, Vol. I F. B. Rule N. W. P. 38 (1866).

538 (1866).

² *Rastam Ali v. Nawab Armat Ali Khan*, P. R. (1875) 21.

³ *Jowala Bukeh v. Dharum Singh*, 10 Moo. I. A. 511 at p.

⁴ *Vide* amended s. 5.

the *Central Provinces*, and Bombay *Muffasil*, i.e., territories outside the Presidency town of Bombay, where customs take precedence of Mahomedan law.¹

The case of a Hindu embracing Christianity or Moslemism presents some difficulties as to the law applicable in such cases in regard to succession and inheritance. According to the *Koran*, a convert to Mahomedanism changes his personal law also; so the general presumption is that a convert from Hinduism to the Islamic faith is governed by the Mahomedan law. In regard to converts from Hinduism to Christianity the case is somewhat different. Upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he renounced his old religion, or, if he thinks fit, he may abide by the old law notwithstanding the fact that he has renounced the old religion.² "The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relations of the converts in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property."³

Before the Indian Succession Act was passed, Christian converts could elect to attach themselves strictly to the old Hindu usages or retain them in a modified form, or wholly abandon them. But now the Indian Succession Act (Act X of 1865), governs Native Christians since the passing of the Act. And their rights and interests as to succession and inheritance of property are entirely regulated by it.

In this connection one matter worth noting is this. In dealing with converts, both Hindu and Mahomedan,

Conversion.

¹ *Vide Reg. IV of 1826, ss. 3, 26. W. R. I. (P. C.)*

Abraham v. Abraham, 9 Ibid. 239.

Moor. I. A. 195 (1863); s. c. 1

there may be cases in which the injunctions of religion and law are the same. In such cases no party can take shelter under custom and defend an objectionable practice. For instance, monogamy is an essential part of Christianity. A Mahomedan or a Hindu convert to Christianity could not possibly marry a second wife, after his conversion, during the life of the first ; and if he did so, the issue by such second marriage would certainly not be legitimate, any Hindu or Mahomedan usage to the contrary.¹

Illegal and
Immoral cus-
toms.

A custom which is contrary to public policy or prejudicial to public interests or against morality cannot have the force of law, nor will it be recognised by any Court of law. It may be ancient and uniform, certain and continuous ; in fact, it may have all the requisites of a valid custom ; yet because it is repugnant to public morality, or against general interests, it can not receive the same recognition from Courts of law as other customs and usages obtain when proved, though at variance with the general law. Following this sound principle, the custom of Hindu widows burning themselves on the funeral pyre of their husbands, (known as a *suttee*) was discountenanced by British Indian Courts ; and an enactment was passed making the aiding and abetting an act of *suttee* a crime and punishable.² Similarly the practice of adopting daughters for prostitution by the Naikins of the Western India was held to be bad and the Bombay Court refused to recognise it.

Such evil customs, even though sanctioned by judicial decisions in the past, are not recognised now-a-days. Like the custom of adoption of a daughter among the Naikins, there are other customs generally known as immoral usages or customs. For instance, the custom of recognizing the

¹ *Hyde v. Hyde*, 1 P. & D. 17 W. R. 77 ; *Sonaluemi v. V. 130* (1866) ; *Skinner v. Orde*, 14 *Hariprasud*, 28 Bom. 597 (1903).
Moo. I.A. 309 at p. 324 (1871); ² *Vide Reg. XVII of 1829, s. c. 10 B. L. R. 125 (P. C.) : s. c.*

right of heirship of illegitimate sons born of adulterous intercourse,¹ of the custom of dancing girls, attached to a Pagoda, going through a sham marriage and practically leading a life of prostitution,² or a caste custom authorizing a woman to abandon her husband and marry again without his consent,³ and so forth.

The custom of demanding and taking *pou* (*hoonda* or *palu*, as it is called in Bombay), as consideration for marriage is against the injunctions of Manu.⁴ Garth, C. J., in one case⁵ held that such contracts are "so far void as to be incapable of being enforced by the rule of equity and good conscience." The Bombay Court went further, and, in a very recent case,⁶ held that a marriage contract for the payment of *pou* is illegal and opposed to morality and public policy.⁷

The English jurists divide customs into two classes:—*General* and *Particular* or *Special*. The former are the universal rule of the whole kingdom and form what is usually known as the Common law of England. The latter are exceptions to the Common law and usually designated as customs, *e. g.*, customs of Gavelkind, or customs of a Manor. Under this head are also included the Customs of Merchants, or rules relative to Bills of Exchange, Partnerships, &c.⁸ The Indian Evidence Act deals with three classes of customs, *viz.*, Public, General, and Family or Private. (*Vide* ss. 32, 48, and 49, of the Act). The distinction between Public and General cus-

Classification
of customs.

¹ *Narayan Bharthi v. Laring Bharthi*, 2 Bom. 140 (1877).

this purpose is a seller of his offspring."—Manu, III, s. 51.

² *Reg. v. Jaili Bharin*, 6 Bom. H. C., C. C. 60 (1869).

⁵ *Ram Chand Sen v. Audaito Sen*, 10 Cal. 1054 (1884).

³ *R. v. Karsan Goja*, 2 Bom. H. C. R. 124 (1864).

⁶ *Dholidas Ishvar v. Fulchad Chhagan*, 22 Bom. 658. (1897).

⁴ "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for

⁷ *See Baksi Das v. Nadu Das*, 9 C. W. N. 90 n. (1905).

⁸ Stephen's Commentaries, Vol. I, pp. 22-25.

toms, as drawn under the English law, seems to be that the former concern every member of the State or Kingdom, whereas the latter are limited to a lesser though still a considerable portion of the community.¹

We do not desire to follow the classification of the Indian Evidence Act but will treat the question of customs and usages with reference to the people, the communities, the professions, the guilds, and the trades among which they prevail and are observed. In British India we find three principal communities occupying the country—the Hindu, the Buddhist and the Moslem. Now each of these communities has its own peculiar customs and usages. So again, the people of Malabar and the Punjab. And as to the professions, guilds, and trades they too have their own customs and usages which govern their mutual dealings. We propose to classify and deal with customs and usages prevailing in British India as follows.

Hindu customs.

Hindu customs and usages are usually grouped under the heads of *Kulachar* and *Desachar*. *Kulachar* (or *Rasm wa Rewaj-i-Khaulan* as it is called in Upper India), i.e., Family Customs embrace all the various customs which obtain in a particular family. *Desachar* i.e., Local Customs are those which prevail in any particular District or within a local area. In dealing with Hindu customs we propose first to deal with Family and Local customs in a general way and then under the head of Hindu customs we shall consider separately the customs in respect of Adoption, Impartibility, Religious Endowment, Inheritance, Marriage and Divorce. Under each of these heads the peculiar customs prevailing in different parts of India and among different classes or sects of the people will be fully and exhaustively considered.

Buddhistical customs.

The Buddhistical customs of the people of Burma, Arakan, Shan and other provinces differ materially from those of the Hindus. The consideration of their interesting customs will occupy a place in this work.

See sec. 48, Explanation, Indian Evidence Act.

The Mahomedans in India form a considerable part of the population and their customs and usages though not numerous will be treated in a separate chapter.

Mahomedan customs.

Besides these, we have to consider the peculiar customs which prevail in Malabar, Canara and in some places in Southern India, and also among Tamil emigrants of Northern Ceylon. The Nairs, the Kandhs, the Moplas, the Numbudris, the Tamils—all of them have customs and usages which are archaic and primitive in their character. And as the study of these customs is very interesting, they will be treated under the head of Malabar customs.

Malabar customs.

The customs and usages prevailing in the Punjab, both of the Hindus and Mahomedans, are so varied and numerous that they cannot be treated as fully as we should desire, but yet we will deal with them as far as we can in the course of this work, noting the most important ones.

Punjab customs.

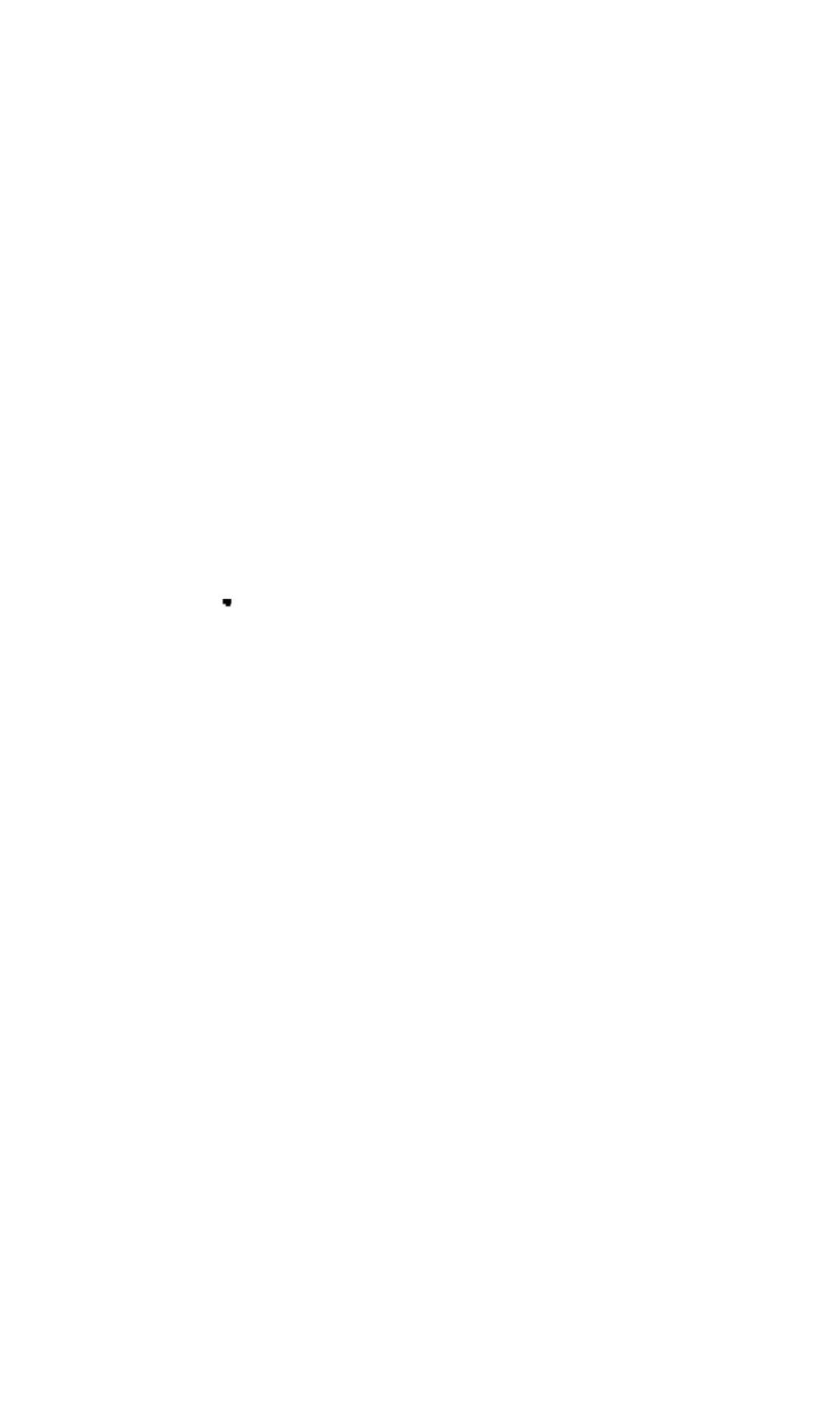
There are certain customs and usages which have force between landlords and tenants and as their respective rights have often to be determined by such customs we must notice them.

Tenancy customs.

Further a large body of customs and usages has come into existence among the various guilds and professions and is commonly known as Mercantile or Trade Customs. Again, certain peculiar customs are also found among brokers and agents, and these are known as customs in Agency. Both Trade and Agency Customs are very important in determining commercial matters and we will deal with them separately. Finally, illegal and immoral customs and usages, not recognized by our Courts, deserve a passing notice.

Trade and Agency customs.

Illegal and Immoral customs.



CHAPTER I.

FAMILY CUSTOMS.

A family custom or *kulachar* is defined to be "the usages of a family transmitted successively (from father to son) according to law."¹ It generally relates to matters affecting the members of a family in their relationship to each other and to the family as a unit. Amongst the members of a family it has an obligatory force and distinguishes the family by its rules from other families. These rules chiefly concern adoption, marriage, descent and devolution of property. In its nature it is quite different from *deshachar* or local custom and stands on a different footing. Unlike *deshachar*, which binds all persons within the local limits in which it prevails, a family custom governs the members of a particular family only and beyond that its controlling influence cannot extend. Under Hindu law a family usage or custom, when clearly proved, outweighs the written text of the law.²

The reason why a family custom is allowed so important a place in the constitution of Hindu law is obvious, when we remember the intimate connection between the celebration of the family sacrifices and the ownership of the family property which is found subsisting in early times. By many of the Hindu sages this connection was made the basis of the theory of the spiritual origin of the

¹ *Katyayana* cited in *Viramitrodaya*. See also *Sumrun Singh v. Khedun Singh*, 2 S. D. Sel. Rep. 147 p. 149 (1814) :—"To legalize any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of

ancestors in the family, when it becomes known by the name of *kulachar*."

² *Collector of Madura v. Mootoo Ramalinga Sathupathy* 12 Moo. I.A. 397 p. 436 (1868); *Bhan Nanaji Utpat v. Sundrabai*, 11 Bom. H. C. R. 249, p. 268 (1874).

proprietary rights.¹ "There is" say their Lordships of the Privy Council, "in the Hindu law so close a connection between their religion and their succession to property, that the preferable right to perform the *shradh* is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union."²

Not a mere convention.

A family custom, to constitute a law for that family, must be shown to have been uniformly observed or of long continuance. A mere convention or an arrangement by mutual assent for peace or convenience cannot be recognized as a family custom. The testimony must show clearly that it has been submitted to as legally binding and not a mere arrangement or a pact among the members of the family themselves.³ In *Myna Boyee v. Ootaram*,⁴ the Judicial Committee observed that "the parties could not by their agreement give new rights of succession to themselves or their heirs unknown to the law."

Requisites of a family custom.

As regards what are the requisites of a family custom we must refer our readers to the Introductory Chapter.⁵ The necessary and indispensable elements which give custom its obligatory character and binding force of law are mentioned there. Those requirements are never so rigidly enforced as in the establishment of a family custom. Its antiquity and invariableness must be established by clear and positive proof. Where such evidence was not forthcoming the question at issue was decided according to the ordinary rule of Hindu law.⁶ Markby J., said that in order to establish a *kulachar* or family custom of descent, there must be shown "either a

¹ *Vide* 11 Bom. H.C.R. 249 p. 264 (1874).

² 8 Moo. I. A. 400 p. 420 (1861).

³ *Soverendranath Roy v. Heera-monee Burmoneah*, 12 Moo. I.A. 81 p. 96 (1868).

⁴ *Vide* p. 24 *supra*.
Ramokurn Mujmooadar Chowdhree v. Raja Bishoonath Singh, 12 S.D. Decis. 399 (1856).

⁵ 11 Bom. H.C.B. 249 p. 277 (1874).

clear, distinct, and positive tradition in the family that the *Kulachar* exists, or a long series of instances of anomalous inheritance from which the *Kulachar* may be inferred.”¹

The discontinuance of a custom even from accidental causes, renders it inoperative. When it has been intentionally abandoned or discontinued by the concurrent will of the family it will be absurd to expect that any Court will revive or give effect to it. In the great Soosung estate case, the Calcutta High Court said that “one departure from a custom is sufficient of itself to destroy the custom if ever it existed” and the Judicial Committee in the same case observed that “a well-established discontinuance must he held to destroy them (usages).”²

In this case the special custom of descent was found to have been designedly discontinued for a long time and, therefore, though the estate was descendible to the eldest son to the exclusion of other sons and was imitable and inalienable, the Judicial Committee held that the succession in this estate should be regulated not by custom, but by the ordinary rule of Hindu Law. In a very recent case³ the Allahabad High Court following the Soosung case observed that where, however, such a custom has been proved the *onus* is upon the party who alleges the discontinuance thereof to prove that fact. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom.

But when a family emigrates from one district to

¹ *Maharanee Heeranath Kooerev v. Baboo Burm Narain Singh* Part I, 297 at p. 316 (1865) : s. c. 15 W. R. 375 at p. 386 in the Privy Council 1 Cal. 186 at 186 at p. 196 (1872). (1871).

² *Rajkishen Singh v. Ramjoy Surma Mozumdar*, 8 Sevestre, * *Sarabjit Partap Bahadur Sahi v. Indrajit Partap Bahadur Sahi*, 27 All. 203 (1904).

Effect of Discontinuance of a custom.

another it may retain its religious rites and observances, and yet acquiesce in a devolution of property in the common course of descent amongst persons of the same race in the district in which it has settled.¹

To be binding, must not be modern.

A family custom cannot be binding, where the family or estate is so modern as to preclude the idea of immemorial usage. So where it was contended that the disputed property was ancestral property and descended to the eldest male heir by reason of its being subject to a custom of primogeniture, the Privy Council found the evidence "insufficient to found a family custom, which the Courts below have held must be proved by something like what we should call, in this country, immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back."²

In a suit for partition a custom was set up according to which the family property was not subject to partition. It was found, however, that the family was indisputably a joint Hindu family. There had been partitions of the family property in former times. But during the last six or seven generations the estate had never been divided. The Privy Council held that this fact alone could not control the operation of the ordinary rule of Hindu Law or deprive the members of a joint and undivided family of the right to demand a partition.³

As long-existing family usages supersede the ordinary laws of inheritance in large zemindaris or petty Rajships,⁴ we propose to deal with some of the important ones now:—

Tipperah
Raj family.

A very curious custom of succession prevails in the Tipperah Raj family, according to which the reigning

¹ *Soorentranath Roy v. Heeramonee Burmoneah*, 12 Moo. I. A. 81 (1868).

² *Umritnath Chowdhry v. Goureenath Chowdhry*, 13 Moo. I.A. 542 at p. 549 (1870).

³ *Durria Singh v. Dari Singh*, 1 J. A. 1 (1873).

⁴ *Vide Maharnajah Gurunarain Deo v. Unund Lal Sing*, 6 S. D. Sel. Rep., 282, (354) (1840).

Rajah in his life-time appoints two persons as his possible successors to the Raj. Of these, one is called the *Jubraj* and the other, the *Burra Thakur*. The *Jubraj* succeeds to the Raj on the death of the Rajah in preference to the next of kin. The *Burra Thakur* is next in rank to the *Jubraj*. On the death of the Rajah and in default of the *Jubraj*, the *Burra Thakur* succeeds to the Raj. The choice of the Rajah in his selection of *Jubraj* and *Burra Thakur* is restricted to the legitimate male members of the Raj family.

The succession to the Tipperah Raj has led to much litigation from time to time. The earliest case reported is *Ramgunga Deo v. Doorgamunee Jubraj*.¹ In this case D brought an action against R in the Provincial Court of Dacca, on the 12th August, 1805, to recover from R the Raj. The case of D was that in 1785 on the death of the then Rajah there being no *Jubraj* or *Burra Thakur*, his (deceased Rajah's) second son succeeded to the zemindari with the sanction and authority of the British Government. The newly installed Rajah had appointed D as *Jubraj* and his own son as *Burra Thakur*. R resisted D's claim on the ground that he (R) was the eldest son and legal heir of the late Rajah and denied the custom alleged by the plaintiff. The Sudder Dewany Adawlut found that the custom, specified above, having existed in the family of the parties for many generations, D, on the death of the Rajah, was entitled to succeed as *Jubraj*, and R, as the son, had no title to succession. This case recognized the custom of the *Jubraj* succeeding to the Raj in preference to the next of kin.

The next case is *Urjun Manic Thakoor v. Ramgunga Deo*.² This suit was instituted after the death of Durgamunee mentioned in the first case. On the 18th April, 1813, Durgamunee died without having nominated anybody to the *Jubrajship*. His opponent in the former case,

¹ 1 S. D. Sel. Rep., 270, (361) [1815]. See the genealogical table of the Raj family given in [1804].

² 2 S.D. Sel. Rep., 189, (177) this case.

Ramgunga Deo, put forward his claim to the Raj now, on the ground that the deceased Rajah had not appointed any *Jubraj* and as he had been appointed *Burra Thakur* in the life-time of the deceased Rajah, his claim was superior to that of others. The Sudder Dewany Adawlut decided in his favour holding that, by the special usage of the Tipperah Raj family the person appointed *Jubraj* takes the inheritance in preference to the next of kin, and the person appointed *Burra Thakur* is considered next to him in succession and takes the inheritance in his default as well as at his death, provided the *Jubraj*, after becoming Rajah, has not appointed any other person to be his *Jubraj*. From this case it is clear that a *Burra Thakur*, once appointed, continues as such after the death of the Rajah unless he be appointed the *Jubraj* by the new King, and also that, if there be no *Jubraj*, the *Burra Thakur* succeeds to the *gadi*.

The third case¹ decided by the Sudder Dewany Adawlut was one brought by the widow of Durgamunee. She, in a separate suit, asserted that as her husband had died without appointing a *Jubraj*, she, as his widow, was entitled to succeed to the Raj and Zemindari. Both the Provincial and the Sudder Courts decided against her. The latter Court in summarily dismissing her appeal, simply referred to their decisions in the *Urijun Manic's* case before mentioned. This case also upholds the above family customs as against succession under the ordinary Hindu law.

The next case² involving the right of succession to the Tipperah Raj is the Privy Council case. In this case the principal issues were (i) whether the last Rajah had

¹ *Ranee Soomitra v. Ramgunga Manik*, 3 S. D., Sel. Rep. 40 (54) [1820].

(P.C.) [See the genealogical chart]: S.C., 3, B. L. R. 13 : s.c. 12 W. R. 21 (P.C.). The same case in the High] Court 1 W.A.R., 177, (1864) s.c., 10 Sevestre 135.

² *Neelkisto Deb Burmono v. Beer-ohunder Thakoor*, 12 Moo., I. A. 523, ((1869)) : s.c., 10 Sevestre, 163,

power of his own free choice to appoint a person *Jubraj* in preference to a senior member of the family and nearest of kin to him, and (ii) supposing there was no valid appointment of *Jubraj*, who was entitled to succeed to the Raj?

The suit was brought by the half-brother of the late Rajah against his (the Rajah's) uterine brother to recover the Raj. The plaintiff alleged that the defendant had not been validly appointed *Jubraj* and whereas the former Rajah had promised that the plaintiff should succeed him and whereas the plaintiff was the eldest surviving son of the former Rajah, and as such belonged to a class out of which, according to the family custom, a *Jubraj* could alone be elected, he was entitled to succeed. The Judicial Committee, however, found that the defendant was duly appointed *Jubraj* by the late Rajah, and that the right of succession to the Raj was governed by *Kulachar* and devolved on the defendant, as there was no restriction by the family custom on the reigning Rajah obliging him to appoint the eldest of his kindred *Jubraj*.

In the above Privy Council case, their Lordships, after referring to the three Sudder Dewany cases, observed thus: "These three cases establish that, according to the custom, a reigning Rajah should name a *Jubraj* and *Burra Thakur*, of whom the first succeeds to the throne, and the latter to the office of *Jubraj*. Both parties to this appeal admit the custom so far."¹ From the above passage it would appear that on the *Jubraj* succeeding to the Raj, the *Burra Thakur*, *ipso facto*, became *Jubraj*. But from the facts as reported in the second case, it is clear that the *Jubraj* on succeeding to the Raj has the right and privilege of appointing a *Jubraj* who may or may not be the *Burra Thakur*. For we see when Rajdhur Manic was Rajah, Doorga Munee was *Jubraj* and Ramgunga Deo was *Burra Thakur*. On Doorga Munee succeeding to the Raj, he did not, as a matter of fact, appoint any *Jubraj*. And Ramgunga Deo's claim to

¹ Vide. 12 Moo. I. A. p. 538.

succeed on the death of Durga Munee was based on the fact that he was *Burra Thakur* and not *Jubraj*.

The most recent case¹ connected with this Raj was heard by a Special Bench of the Calcutta High Court on appeal from the District Court. The case, however, was disposed of on the point of jurisdiction. There the plaintiff's contention was that according to the custom the appointments of a *Jubraj* and a *Burra Thakur* by the reigning Rajah "fix irrevocably the succession in the parties nominated, and the *Jubraj* so appointed is indefeasibly entitled to succeed on the demise of the reigning Rajah, who appointed him to the Rajship" and "the *Burra Thakur* so appointed is indefeasibly entitled to succeed to such property on the demise of the *Jubraj*." The defendant on the other hand stated *inter alia* that "each reigning Rajah is, after his succession to the throne, empowered of his own absolute and free choice to nominate and appoint a member of the royal family to be his immediate successor under the title and designation of *Jubraj*, who, on such nomination, and appointment, becomes entitled to, and does, if alive on the death of the Rajah by whom he was so appointed, succeed to the Raj."²

It is a matter of great regret that the High Court was precluded from settling this much disputed family custom once for all. What their Lordships of the Judicial Committee deduced from the above three Sudder Dewany cases to be the family custom of the Tipperah Raj³ was merely an *obiter dictum*, the main issue in the case being whether the reigning Rajah was obliged to appoint the eldest of his kindred *Jubraj*. And further more, that deduction, as we have already pointed out, was not borne out by the facts. From all these cases, however, we think that the following

¹ *Shamarendra Chandra Deb* 12 C.W.N. 777 : s.c. 8 Cal. L.J. 1.
Barman v. Birendra Kishore Deb ² *Vide Ibid pp. 785, 786.*
Barman, 35 Cal. 777 (1908) ; s.c. ⁴ See *supra* p. 49.

customs pertaining to the Tipperah Raj may be considered as established.

Firstly—According to the family custom, the reigning Rajah nominates and appoints a *Jubraj* and *Burra Thakur*. So long as the nominees are alive the appointments of *Jubraj* and *Burra Thakur* are irrevocable.

Secondly—On the death of the King, the *Jubraj* succeeds to the Raj, and is at liberty to appoint a new *Jubraj*, or affirm the previous *Burra Thakur* as *Jubraj* and appoint a new *Burra Thakur*.

Thirdly—The choice of the Rajah in these two appointments is restricted to the legitimate male members of the Raj family.

Fourthly—The *Burra Thakur* has no indefeasible right to succeed to the *Jubrajship* on the installation of the *Jubraj* to the throne, but it depends entirely on the will of the new Rajah.

Fifthly—When at the demise of the Rajah there happens to be no *Jubraj* but only the *Burra Thakur*, the latter succeeds to the Raj in preference to the next of kin.

Sixthly—It would appear that if at the death of the Rajah it happened that neither *Jubraj* nor *Burra Thakur* were in existence, the succession to the Raj would “devolve on the next of kin, respect being had to primogeniture.”¹

The Tipperah estate being indivisible, the reigning Rajah is not competent to make a grant or give what may be termed a lease, the effect of which might be to alienate a portion of the lands comprised in the estate for a period extending beyond his life. “It appears,” said the learned Judges, “from the cases of *Ramgunga Deo v. Doorgamunnee Jubraj*,

Power of
alienation of
the reigning
Rajah of
Tipperah.

¹ *Vide Urjun Manic Thakoor v. Burmono v. Beerchunder Thakoor, Ramgunga Deo*, 2 S. D. Sel. Rep. pp. 178, 180 (1815); *Neelkisto Deb* 2 Moo. I. A., pp. 541-42 (1869).

Urjun Manic Thakoor v. Ramgunga Deo, and *Ranee Soomitra v. Ramgunga Manick* that by special usage the *Jubraj* or person nominated by the reigning Rajah of Tipperah succeeds on his death to the Raj, and the estate is one of those of the nature contemplated by Regulation X of 1800, and not liable to division. The estate, therefore, being indivisible, it is clear that the late Rajah was not competent to make a grant or give what may be termed a lease, the effect of which might be to alienate a portion of the lands comprised in the estate for a period extending beyond his own life.¹ In a note appended to this decision it was remarked that in another case by the same plaintiff against *Ranee Kotee Lukkeea Debee*,² the competency of the Rajah of Tipperah was the point directly at issue, and the decision was in favour of the plaintiff on the ground of family usage as in the foregoing case.

But if the lessee was an outsider and not a member of the Raj family, such alienation would be unaffected by the family custom. Thus in a case where the Maharajah sued to recover lands from the defendant, which, the latter alleged, had been leased to him in perpetuity by a former Rajah, the learned Judges distinguished the case of *Maharajah Kishen Kishore Manik v. Hurree Mala*³ as the defendant in that case was a member of the family, and the Court there ruled that it was not competent to the reigning Rajah of Tipperah to alienate the lands of the Zemindari of the Raj to one of *his own family* for a period extending beyond the term of his own life. In the present case the lessee was not a member of the family, and consequently, not the custom of the family, as between its several members, but the ordinary law of landlord and tenant must govern the decision.⁴

¹ *Maharajah Kishen Kishore Manick v. Hurree Mala*, 6 S.D. Sel. Rep. 155 (186) [1837].

² *Ibid.* 157.

³ See 6 S. D. Sel. Rep. 155 (186)

⁴ *Maharajah Ishun Chunder Manik Bahadur v. Myranee*, S. D. Decis. 1375 (1857).

FAMILY CUSTOMS.

A rather ingenious defence was set up by a married daughter of the Raj family, when the reigning Rajah sought to recover from her certain lands alleged to have been held on a *mokurruree pottah* given by his predecessor. The Rajah based his claim upon the custom of the family, *i.e.* that any grant of this nature was resumable on the death of the grantor. The lady asserted that she, having married into another *gotra* (race) was no longer a member of the family of the Rajah of Tipperah, and therefore she was not affected by the alleged custom. But the Court, on consideration of the two foregoing cases, observed that "all grants of such a nature as was sought to be resumed, when made by the Rajah of Tipperah to a member of his family, were, by recognized custom, voidable by his successor, and that, in fact, the grantee took subject to this condition, and that a daughter of the Rajah, whether married or not, was a member of the family."¹

Alienation to
a daughter of
the Raj fami-
ly.

Succession to the Tirhoot Raj is governed by *Kulachar* and the estate devolves entire on the eldest son and is not subject to division. In a suit to recover a moiety of the estate, the plaintiff asserted that succession was to be governed by Hindu law, while the defendant rested his claim on *Kulachar*, alleging that the Raj and domain appertaining thereto had never been separated, but had devolved entire on each holder on the death of his predecessor for fourteen generations, and that such custom was still in force; that this had been maintained for some generations past by virtue of a deed of settlement under which the Raj and estates had, on each occasion, been conveyed to the eldest son, suitable provision being made for younger branches; that in case of there being no son, it would devolve on the next brother and his descendants in right line according to primogeniture. The Court found that the evidence was

Tirhoot Raj
Family.

¹ *Roop Moonjuri Koore v. Beer-chunder Joobraj*, 5 Wyman, 170 (1868). See also *Maharajah Beer-chunder Manickayav v. Eshan Chunder Thakoor*, 2 Shome, 94 (1878) which followed this case.

conclusive as to the existence of the immemorial family custom or *Kulachar* regulating succession as contended by the defendant.¹

Baboo² Ganesh Dutt Singh, a younger member of the family, brought a suit against the then Maharajah to recover possession of a moiety of the ancestral estate of Tirhoot. The Privy Council dismissed his claim, following the ruling of the foregoing case, and observed : “ We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in the District, and indeed generally under the Hindu Law, estates are divisible amongst the sons when there are more than one son ; they do not descend to the eldest son but are divisible amongst all. With respect to a Raj as a Principality, the general rule is otherwise and must be so. It is a Sovereignty, a Principality, a subordinate Sovereignty and Principality no doubt, but still a limited Sovereignty and Principality, which, in its very nature, excludes the idea of division in the sense in which the term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be a positive law to the contrary.”³

In the Tirhoot Raj family a custom prevails to the effect that the Rajah in possession in his own life-time may abdicate and assign by deed the Raj-title and domain to his eldest son or next immediate male heir, provision being

¹ *Maharaj Kowur Basdeo Singh v. Mahara*

roodur Singh Bahadur, 7 S. D. Sel. Rep. 271

(1846) : S.C. 2 S. D. Decis. 52. See

Baboo Ganesh Dutt Singh v. Mahara

roodur Singh, 2 S. D. Decis. 79 (1846).

² The original founder of the

family of the Tirhoot Raj and

many of his successors were called

Thakoors, and not *Rajahs* or *Maha*

rajahs. The younger sons were

called “ *Baboo* ” or *Maharajah*

Baboo. See 6 Moo. I. A. 164, p. 191 (1855).

³ Vide *Baboo Ganesh Dutt*

Singh v. Moheshur Singh, 6 Moo.

I.A. 164 at p. 187 (1855).

made for the *Babooana* allowance for the younger sons. Such custom has been recognized by the Privy Council.¹

The Bettiah Raj now consists of two Pergunnahs— Bettiah Raj. Simrown and Majhowa. But at the date when the East India Company became the rulers of Bengal in 1765, what is now known as the Bettiah Raj was included in a larger property called the Raj Reasut of Sirkar Champaran, which was an ancient imparible Raj comprising in addition to Pergunnahs Simrown and Majhowa, two other Pergunnahs called Maishi and Babra. The Sirkar Champaran was formerly held by Rajah Guj Singh, who died in 1694, leaving Dhalip Singh, his eldest son and successor to the Raj, and two other sons, Pirthi Singh and Satrajit Singh. Rajah Dhalip Singh died in 1715 and was succeeded by Rajah Dhrub Singh who died in 1763 without sons, but leaving a daughter. On the death of Rajah Dhrub Singh, his daughter's son, Rajah Jugal Kishore Singh entered into possession of the Sirkar Champaran and was in possession thereof at the date when the East India Company assumed the Government of the Province.

In 1766, one year after the acquisition of the Dewany by the Government, Rajah Jugal Kishore Singh having joined in opposition to the British Government, and having been defeated by the forces of the East India Company, fled to Bundelkund; whereupon the British Government took possession of his estate and placed the zemindari under the management of their Revenue officers. In the year 1771, he returned upon the invitation of the members of the Patna Council and upon that occasion a portion of his estates, consisting of the Pergunnahs and other particulars, were restored to him. But in consequence of his failing to discharge the revenue assessed upon them, he was, in the following year, again deprived of the management and

¹ Vide 6 Moo. I. A. 164. (1855); *Bahadur*, 7 S. D. Sel. Rep. 271 also see *Maharaj Kowur Basdeo* (1846).
Singh v. Maharaja Roodur Singh

possession of these Pergunnahs, and ordered thenceforth to reside at Patna.

At the time of Rajah Jugal Kishore's restoration to a portion of his zemindari, the residue thereof was bestowed by the Government upon Rajah Sri Kishen Singh and Baboo Abdhut Singh, who were first cousins on the paternal side of the deceased Rajah Dhrub Singh.

Bir Kishore Singh was the son of Rajah Jugal Kishore. He was allowed the same allowance as his father and the allowance continued until 1790, when the decennial settlement was established.

Under orders of the Governor-General in Council, certain Pergunnahs of the Sirkar Champaran, *viz.*, Simrown and Majhowa, were settled with Bir Kishore Singh and the remainder *viz.*, Pergunnahs Maihs and Babra, were settled with Rajah Sri Kishen Singh.

Rajah Sri Kishen died in 1798, and was succeeded by his son Gunga Pershad Singh. In 1808 Gunga Pershad filed a suit against Bir Kishore, to recover Pergunnahs Majhowa and Simrown. The suit was dismissed on the ground that the cause of action was barred by limitation, and the decree was ultimately affirmed on that ground by the Judicial Committee.¹

Recently another suit was brought by Ram Nundun Singh to recover the Raj of Bettiah, on the death of Maharajah Sir Harendra Kishore Singh without issue, which happened in 1893. The plaintiff contended, that according to the custom of the family the estate descended to male heirs only in a course of lineal primogeniture in exclusion of females. He also contended alternatively, that the Bettiah estate was the joint family property of the predecessors of the deceased Maharajah and himself, between whom there had been no division of estate, and he was therefore entitled to succeed as

¹ *Vide Dundial Singh v. Anund* (1837).
Kishnoor Singh, I Moo. I. A. 482

co-parcener by right of survivorship in exclusion of the widows of the deceased Maharajah, the family being governed by the law of the Mitakshara. The defendants on the other hand contended that the Bettiah estate, consisting of the Pergunnahs of Simrown and Majhowa, became and was the self-acquired property of Rajah Jugal Kishore by grant from Government. The suit ultimately went to the Privy Council, and their Lordships decided the matter against the plaintiff. Their Lordships have held that :— The Bettiah estate is and has always been treated as an Impartible Raj. The Government was at liberty to divide the Sirkar into two portions and to grant one portion away from the heir of the former owner of the estate; and, it (the Government) was equally at liberty to grant the whole away from him though, from reasons of policy, it preferred to extend its favour to him in a certain measure. The grant of Maihs and Babra to Sri Kishen and Abdhut was a direct exercise of sovereign authority, and proceeded from grace and favour alone; and the reinstatement of Rajah Jugal Kishore's heir to a portion of his father's former estate also bore the same character. The present Bettiah Raj must be taken to be the self-acquired property of Bir Kishore Singh, though with all the incidents of the family tenure of the old estate as an Impartible Raj.¹

The alleged family custom, excluding females from inheritance, affecting the Bettiah Raj has not been proved. The widows of the last male holder dying without issue and without leaving collateral heirs, may, therefore, succeed to their deceased husband's estate. It is important to note that the Bettiah Raj domain is now under female ownership.

Though succession by the eldest son is a feature peculiar to large Estates or Principalities, yet the question as to whether that right belonged to a son of the *paat* or eldest

Manbhom Es-
tate.

¹ *Ram. Nundun Singh v. p. 193 (1902) S. C. W. N. 57,
Maharni Janki Koer, 29 I. A. 178*

Rani, to the prejudice of an elder son by another wife was once a matter of contention in the Manbhom estate. The deceased Rajah had five Ranis. The eldest son was born of the youngest or fifth Rani. He claimed the Raj by virtue of an immemorial family custom whereby the eldest son succeeded to the Raj and the other sons received only subsistence allowance. The son of the eldest or *paat* Rani, who was a younger son, alleged that it was the family custom for the eldest son of the first or *paat* Rani to succeed. The parties joined issue upon this point of family custom. The Sudder Dewany Adawlut, by a majority of the Judges, found that the prevailing family custom, as established by evidence, was that the eldest son, and not the son of eldest Rani, was to succeed.¹ Barlow, J. (*dissentiente*) observed that the evidence tended rather to show, that in the Jungle Mahal estates, the custom was for the eldest son of the *paat* Rani to succeed to the Raj.

Jungle
s.

A question arose, as to whether the widows of the deceased Rajah in the Jungle Mahals were entitled to succeed in preference to the brother of the deceased. On both documentary and oral evidence it was found that the zemindari in question had always been held by the chief male heir, the remaining heirs receiving only food and raiment. It had never been held by a Rani or other female. Agreeably to the family custom it was decided, that the brother of the deceased childless Rajah should take his estate to the exclusion of his widows.²

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In several cases before the Sudder Dewany Adawlut in connection with the succession to the Raj, in the Tributary Mahals in Cuttack, the question was raised as to whether by family custom a son born of a *phoolbibahi* woman was entitled to succeed. By a practice in vogue

¹ *Rajah Rughonath Singh v. Rajah Hurrihur Singh*, 7 S. D. Sel. Rep. 126 (186) (1843).

² *The widow of Rajah Zorirour Singh v. Koonwur Pertee Singh*, 4 S. D. Sel. Rep. 57 (72) (1825).

among the Rajahs in these Mahals, they usually have three kinds of wives known as "Paat," "Phoolbibahi" and "Kaneez."¹ The *Paat Rani* is the first or chief wife of the Rajah and must be of the same caste as himself. The *Phoolbibahi Rani* may be a woman of another caste and is taken into the Rajah's establishments by the ceremony of his putting round her neck a garland of flowers. The *Kaneez* is a slave concubine.

In *Pachees Sawal*² the status of a *phoolbibahi* wife has been clearly described by the chiefs in their answers. They said that if a Rajah receives as a wife the daughter of any respectable person not of his own caste, she is called a *phoolbibahi*. In non-regulation Mahals or *Gurhs*, if a Rajah leaves no son born of any of his *Ranis* but leaves a brother and sons by his *phoolbibahis* and concubines, the brother will succeed; and if he leaves no brother, the succession will go to his brother's sons; in default of a brother's son, though there may be sons by *phoolbibahis*, slave-girls or concubines, one of the brethren of his (the Rajah's) grandfather, who is the nearest kin, will be the rightful claimant to the Raj. In the absence of any such, the son of a *Phoolbibahi* has the next right. The *Gurhjat* Rajahs said that the "son of a concubine or of a slave-girl has no right to the succession." There is a remarkable difference between the *Gurhjat* and *Killajat* custom of descent.

¹ Vide *Rajah Sham Soonder Muhunder v. Kishen Chunder Bhowurbur Rai*, 4 S. D. Sel. Rep. 39 (94) (1825).

² This is a document which embodied the answers given by the chiefs of the sixteen Tributary Mahals in Cuttack and of certain *Killahs* in the Province of Orissa to questions put by the Superintendent of the Tributary Mahals

in 1814. After that statement had been drawn up, Regulation XI of 1816 was enacted which provided that the estates of these sixteen Tributary Mahals should descend entire to the person having the most substantial claim according to local and family usage. See *Nitarand Murdiraj v. Sreekurun Juggernath*, 3 W. R. 116 (1865).

The Rajah of Kenderpara in his statement in a case¹ said that *Kaneez-zadas* were not entitled to succeed to the Tributary estates ; that a *Phoolbibahi Rani* was esteemed in a little higher light than a *Kaneez* or concubine. He was corroborated by other chiefs.

Such being the position of a *Phoolbibahi Rani*, a claim to the Raj of a deceased Rajah by a son of such Rani has in several instances been rejected, preference being given to a brother of the deceased Rajah when leaving no legitimate issue. In *Rajah Sham Soondur Muhunder v. Kishen Chunder Bhowurbur Rai*² the plaintiff stated that the *Killah* of Dekenal was the hereditary estate of his family and that the occupant thereof bore the title of Rajah, and according to the custom of the family, the eldest son of the Rajah by his wife (*Paat Rani*), or, on the failure of such, the adopted son of the Rajah would take the estate on his death ; that in the event of the Rajah leaving neither legitimate son, nor adopted son, the brother or brother's son of the deceased, supposing him to have been born in wedlock, would take the estate to the perpetual exclusion of illegitimate sons of the Rajah by a *Kaneez* or concubine, who according to the family custom could never become Rajah. The defendant stated, *inter alia*, that according to the custom of the family, the eldest son of the deceased Rajah, whether he was the son of a *Paat Rani* or *Phoolbibahi* or *Mahadye Rani*, would take the estate, and that, in default of sons, it would go to the next of kin. The Superintendent of the Tributary Mahals decided the case in favour of the plaintiff, but it was reversed by the Sudder Dewany Adawlut and the plaintiff's claim was dismissed as being barred by s. 4, Regulation XI of 1816.³

¹ See *Rajah Sham Sundur Muhunder v. Kishen Chunder Bhowurbur Rai*, 4 S. D. Sel. Rep. 39 at p. 44 (1825).

² 4 S. D. Sel. Rep. 39 (1825).

³ S. 4 is as follows :—“ Superintendent is prohibited from

taking cognizance of any suit the cause of action of which shall have arisen antecedent to the 14th day of October, 1803, the date on which the Fort and town of Cuttack were surrendered to British arms.” This Section has since been repealed.

In another case arising out of the same estate, the plaintiff who was born of a *Phoolbibahi* Rani claimed the Raj. It was proved in this case that the *Phoolbibahi* women of the Rajah resided in the *Mahal-Serai* or family dwelling, and the mother of the claimant never resided in the *Mahal-Serai*. The mother, therefore, being only a kept mistress, her son could not, conformably to the usage of the family, succeed to the Raj.¹

The Killah of Bankee is another Tributary Mahal. In an action to obtain possession of the Raj, of the fort of Bankee by the plaintiff who was the issue of a *phoolbibahi* marriage, the defendant stated that he was the collateral relation of the late Rajah who, having no legitimate child of his own, adopted the defendant and placed him in the Raj, and that the plaintiff was the son of the late Rajah by a slave-girl, and according to usage, could not succeed to the *gadi*. It was found that the plaintiff was the son of a slave-girl, and, as such, not entitled to succeed to the Raj.²

In *Nittanund Murdiraj v. Sreekurun Juggernath Bewartah Patnaick*,³ the above three cases were referred to, and it was held that a brother of the Rajah of Attgurh had a preferential title over the Rajah's son by a *Phoolbibahi* wife to succeed to the Raj. This custom was well borne out by the answers of the chiefs of the sixteen Tributary Mahals, to whom the Superintendent of those Mahals addressed a number of questions bearing on the point. All the answers have been recorded in a document which is known as *Pachees Sawal* already alluded to. The High Court, in deciding this case, mentioned it as an authority on the subject.

Koenghur is another Tributary Mahal, and according

¹ *Rajah Jenardhun Ummur Singh Mukendur v. Obhoy Singh*, *Rajah Juggernath Sree Chundun Mahapatpur*, 6 S. D. Sel. Rep. 296 (1840). 6 S. D. Sel. Rep. 42 (1835).

² *Bulbhuddur Bhourbhur v. 3 W. R. 116 (1865).*

Killah
Bankee.

Attgurh Raj.

Koenghur
Raj.

to the family custom of the Raj, the sons of a Rajah by wives of a lower class than the Rajah rank after the sons of the same caste as the Rajah. The plaintiff, who was a widowed Rani of the late Rajah, claimed the Raj on behalf of a minor, alleged to have been adopted as his son by her late husband, the Rajah. The defendant, who was said to be the son of the late Rajah by a *Phoolbibahi* marriage, alleged that his right to succeed to his father had been recognized by the Superintendent of the Tributary Mahals and by the Government. In this case, though the sole question was the truth or otherwise of the alleged adoption, arguments were addressed to the Court on behalf of the plaintiff as to whether the defendant was the son of the late Rajah, and, if a son, whether he was born of such a marriage as entitled him to succeed to the Raj on the death of his father. The Court, however, thought that it was not necessary for them to go fully into these matters until the question of adoption was fully established. Their Lordships observed : "The plaintiff's claim must stand or fall upon its own merits, independent of the sufficiency or otherwise of the defendant's title, the more so as it may be admitted, and was indeed admitted by the defendant's Vakils in the course of the argument, that the defendant has not such a son as would have any title to succeed to the Raj, if the late Rajah had left any son by his regular wives, or even if the late Rajah had adopted a son. The defendant is a son by a wife of a lower caste than that of the late Rajah ; and the sons of such wives admittedly rank below and after the sons by wives of the same caste as the Rajah."

In certain instances, however, a son by *phoolbibahi* marriage succeeded in the absence of any other son by a superior kind of marriage, and *in preference* to a next of kin. The case of *Durrap Singh Deo v. Bazzardhur Roy*^a was an instance in point, and that was in *Killah Pooteah*

Rani Bistooprea Patmohadea 2 W. R. 332 (1865).

v. Basoodeb Dul Bawartee Patnaik, * 2 Hay 335 (1863).

in Cuttack. *Prandhur Roy v. Ram Chunder Mongraj*¹ was another relevant case, in which it was held that a *phoolbibahi* son could succeed to the Raj in preference to the agnates on failure of male issue by a Paat Rani. Among the Rajahs of Chhendra, illegitimate son by a maid servant, and even of a concubine may, in the absence of certain other male relations, claim the Raj.²

The Dalbhook family is one of a group of families whose ancestors originally came from the north-west of India and established themselves by conquest in the Jungle Mahals in Bengal. The estate is an imitable Raj, descending upon a single heir according to the rule of lineal primogeniture; and the heir, so succeeding, has to make suitable provision for the other members of the family, male and female. In a very recent case, the plaintiff brought a suit to recover possession of the ancestral imitable estate, called Dalbhook, on the death of the last male proprietor who died childless. The defendant set up a custom of lineal primogeniture prevailing in the family. Both the parties belonged to the Dalbhook family whose head-quarters are at Ghatsila. The Subordinate Judge of Bankura dismissed the suit finding that lineal primogeniture "in a limited form" was the rule of succession in the family. This finding was upheld by both the High Court and the Privy Council to which the case was taken by special leave.³

A somewhat singular custom with regard to the *Khorposh Mouzahs* was alleged to have been prevalent in the family to the effect that they descended from Rani to Rani, the senior widow or wife, as the case might be of the Rajah, being entitled to hold them for life. This custom was not proved and upon evidence the Court found that the Rani held a life-estate in the Mouzahs in question and that

Dalbhook Estate.

¹ 17 S. D. Decis, 16, (1861)

² *Rungadhur Narendra Mardraj Mohapatra v. Juggurnath Bhrombar Roy*, 1 Shome 92, (1877).

³ *Mohesh Chunder Dhal v. Satrughan Dhal*, 29 I.A. 62 (1902) : s.c., 29 Cal. 343 : s.c., 6 C.W.N., 459. See also 2 C.L.J. 20. at p. 28.

the reversion expectant on the determination of that estate was in the Rajah. As life-tenant she would be clearly not entitled to open any new mines. She had no power to remove by herself or by her lessees any of the minerals in the Mouzahs granted to her as *Khorposh*. The Rajah as the reversioner had the right to restrain her from so doing, and that right could be lawfully asserted by his tenant to whom he had demised his interest in the mines on the land in question.¹

The estate of Soosung was subject to various litigation and in more instances than one the family custom of succession by primogeniture was set up and sought to be established, but all attempts to prove the same failed ; and it was finally held by the Privy Council that the Soosung estate was a military *Jagir* resumable at pleasure, and, not a Raj, succession to which depended solely on the will of the sovereign power of the time. The first reported case² was between the eldest son of the late Rajah of Soosung and the widow of his second son. She claimed one-third share of the whole estate alleging that, on the death of the late Rajah, the estate became the joint property of his three sons in equal portions and that she, as the widow of one of the sons, was entitled to it. The defendant pleaded family custom as above. The Sudder Dewany Adawlut found on the evidence that the defendant had established the custom, and said that the estate in question differed in many respects from a common zemindari, and that from several *firmans* filed it was clear that the estate was granted as a *Jagir*. It was further established that in "no one instance has the rule of succession by primogeniture been set aside since the grant ; on the contrary, it seemed that Raj Singh, the father of the defendant Bishennath Singh, succeeded his

¹ *Prince Mahomed Buktyar Shah v. Rani Dhojamani*, 2 C. L. J. 20, (1905).

² *Rani Hursoondree Dibbeah v. Rajah Bishen Nath Singh*, 3 S. D. Decis. 339 (1847).

elder brother Kishwur Singh, notwithstanding that the brother left a widow, who, under the usual practice of Bengal, would have succeeded, but for the family usage pleaded ;" and the Court further observed "I do not think the neglect and supineness of the defendant in the management of his affairs, which has allowed the plaintiff to get her name entered, and to obtain a partial possession, sufficient to set aside the established usage of the family, which has been handed down for thirteen generations." And thus her claim was dismissed.

The next case¹ was brought by the eldest son of the late Rajah to recover, from the alleged adopted son of the widow of his (the plaintiff's) youngest brother, possession of one-third share of the Soosung estate, which was given over to the said minor adopted son by the Sessions Judge in proceedings taken under Act IV of 1840. The plaintiff rested his claim on *Kulachar*, by which the entire estate of the Rajahs of Soosung devolved on the eldest son to the exclusion of all other heirs and by which he also sought to invalidate the adoption. It appeared that the plaintiff with his two other brothers, by a joint petition, applied for registry of all their names as joint proprietors of the estate on the death of their father, and by other acts acknowledged their right of co-heirship along with himself. The learned Judges of the Sudder Dewany Adawlut found that these admissions by the plaintiff were positive and absolute and were not to be regarded as mere supineness or neglect. Under the Regulations they were conclusive against his personal claim, but the benefit of those admissions could not be claimed by any other than a lawful heir of his brothers. Their Lordships therefore remanded the case for investigation as to whether there was any family custom which bars inheri-

¹ *Rajah Bishnath Singh v. Ram manee Dibbeah*, widow of Jugger-Churn Mujmodar [Guardian of Nath, third son of the late Rajah] the alleged adopted son of *Inder-* 6 S. D. Decis. 20 (1850).

tance by adoption and whether the adoption was otherwise correct according to law. They did not think it necessary to advert to the plea that *Kulachar* as to primogeniture had been established in Hurrosoondree's case.

After remand the case again came up before the Sudder Dewany Adawlut on appeal.¹ The issue arising out of the pleadings was simply this:—Is there a custom in the family of the plaintiff by which the eldest son alone succeeds to the estate of Soosung, and under which custom Rani Indramanee received maintenance and in opposition to which plaintiff has been dispossessed by the defendant under the orders of the Sessions Court, or does the ordinary rule of succession under the Hindu law current in Bengal prevail in the family as pleaded by the defendant? The question of the validity of the adoption of the defendant did not arise in this case as it was not pleaded by the parties. Their Lordships found, after very carefully going through the evidence, that the respondent (plaintiff) had been unable to afford that clear and positive proof of the ancient and invariable custom set up in his plaint, which the nature of the case required; moreover the appellant (defendant) had proved by most cogent evidence that since the death of Rajah Raj Singh, who was in possession of the estate of Soosung before, at and after the decennial settlement, the ordinary rule of Hindu inheritance had prevailed in the family. The decision of the lower Court was accordingly reversed.

The third case² which ultimately came before the Privy Council was originally brought by Rajah Prankishen Singh against Hurrosoondree Dabee, widow of one of his uncles (Gopeenath Singh, the second son of Rajah Raj Singh),

¹ *Ram Churn Mujmoodar Chowdhury* (Guardian of Rajah Sreekishen Singh minor Defendant) v. *Rajah Bishonath Singh*, after his death, *Rajah Prankishen Singh*, 12 S. D. Decls, 399 (1856).

² *Ramjoy Muzoomdar* v. *Rajah Prankissen Singh*, 8 Sevestre 297 (1865); s. c. in the Privy Council *Raj Kissen Singh* v. *Ramjoy Surma Muzoomdar*, 1 Cal. 186 P.C., 1872.

and some purchasers from her, to recover possession, "by family custom," of one-third of the Soosung estate. The plaintiff stated that according to family custom prevalent in the Raj or estate, the right of the plaintiff as proprietor of the estate accrued after the death of his father Rajah Bishonath Singh. The claim was rested entirely on the ground of family custom, under which, it was alleged, the estate was descendible on the eldest son, to the exclusion of the other sons, and further that it was impartible and inalienable.

It appears that the entire of 16 annas of the Pergunnah were at one time enjoyed by the ancestors of the family but two annas were afterwards alienated, and it appears to have been assumed on both sides that these 2 annas were a long time ago given as dower on the marriage of a daughter of one of the possessors. Rajah Raj Singh, the grand-father of the plaintiff Prankishen, died in 1822, leaving three sons, Bishonath (the father of the plaintiff Prankishen), Gopeenath and Juggernath ; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the Pergunnah, and praying to be registered, and that they were so registered for the 14 annas. Gopeenath held the one-third of the estate until his death ; his widow Hurrosoondree succeeded to the possession and when the present suit was commenced against her in 1861, Gopeenath and she, as his widow, had been in possession for nearly forty years, viz., from 1822 to 1861.

The High Court came to the conclusion that the plaintiff had failed to establish by evidence the exceptional family custom on which he relied ; and, further, that if there had been such custom as pleaded, it was certainly waived by the sons of Raj Singh on his death in the year 1822. There was nothing in any one of the documents submitted to the Court, either before or after the British Government, which prohibited alienation while, at the same time,

the Court found that at a period previous to the British rule alienation of two-sixteenths of the property in dispute did take place and was acquiesced in by the successors. It was manifest from plaintiff's statement and evidence that the property was, during the Mahomedan Government, a Military *Jagir* resumable at pleasure, and not a *Raj*, and that the succession to it went on not by the right of custom but by the will of the Sovereign power of the time. The Privy Council upheld the judgment of the High Court.¹

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Family custom of the Maharajah of Chota Nagpur formed the subject-matter of a suit brought by the members of a junior branch of the family. The plaintiff, as representative of his father, sought to recover possession of a fourth share of certain moveable and immoveable properties on the ground of a special custom by virtue of which all the surviving male descendants of the common ancestor, Thakoor Bulbhuddur Sahee, were entitled to obtain equal shares of the properties left by a childless member of the said Thakoor's family without any reference whatever to their position in the family-tree, or to their capability to satisfy the conditions of heirship laid down by the ordinary Hindu Shastras. But he failed to establish the alleged custom. The defendants, on the contrary, alleged a long established custom of the family in conformity with which he, as representative of the eldest branch, was entitled solely and exclusively to the properties in dispute. The Court relying on the evidence, adduced by the defendant, decided that according to the custom in the eldest branch of the Thakoor A. Sahee's family, the property left by a childless member devolved on the eldest or the *gadi Thakoor*, and as defendant's position in B. Sahee's branch

¹ *Ramjoy Muzoomdar v. Rajah Kissen Singh v. Ramjoy Surma Pranhissen Singh*, 8 *Sévestre* 297 *Muzoomdar*, 1 Cal. 186 P. C. (1872). (1865) s. c. in Privy Council *Raj*

of the family was similar i.e., that of a *Thakoor*, he had every right to contend that the same custom might be presumed to obtain in both until the contrary was proved.¹

In another case the Sudder Dewany Adawlut agreeably to the family usage; upheld the succession by primogeniture to an estate in Chota Nagpur against a claim for division of the ancestral estate.²

In *Koonwar Bodh Singh v. Seonath Singh*,³ the action was brought by the plaintiff to recover two-thirds of the estate of Ramghur in Chota Nagpur. In 1772 the estate was confiscated as the then Zemindar had become refractory and it was conferred on another person in recognition of his public services. The estate was held by his son and afterwards by his grandson to the exclusion of all other members of the family. On the suit of two sons of the original grantee to participate with their nephew, the judgment was given against them, the Zemindari being one of those estates not liable to division, recognized as such by Regulation XI of 1793. Provision was made in that Regulation for the future abolition of custom, and it was enacted that after the 1st of June, 1794, such estates should descend according to the Mahomedan and Hindu laws of inheritance. But this provision was not held to be applicable to the present case, the father of the claimants having died in the year 1774.

With regard to the validity of the claim of the plaintiff according to the Hindu law of inheritance the Court observed that this point turned upon the further question whether the estate in dispute was to be considered a common Zemindari divisible by the laws of inheritance, or one of those estates which, by the custom noticed in

¹ *Thakoor Jeetnath Sahee v. Singh v. Thakoorai Tilukdharee Lokenath Sahee Deo*, 19 W. R. 239 *Singh*, 6 S. D Sel. Rep. 260 (1839). (1873).

² 2 S. D. Sel. Rep. 116 (92)

³ *Thakoorai Chutterdharee* (1813).

and abolished by Regulation XI of 1793, descended to one heir in exclusion of all other members of the family.

Adverting, however, to the extent and situation of the estate, to the Zemindar possessing the title of Rajah, and to his maintaining a sort of feudal establishment of troops and dependant *Jagirdars*, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance.

In another case¹ the subject of investigation was the right of succession to the Raj or Zemindari of Ramghur in Chota Nagpur, vacant by the death of the infant son of the last actual Maharajah. The infant in question was a posthumous child. On the death of the Maharajah without issue the Court of Wards had assumed charge of the estates. The suit was commenced by the plaintiff, as next agnate, against the officer of the Court of Wards, and against the widow of the late Maharajah and mother of the deceased infant. The lady alleged that she was entitled as heir to succeed on the death of her husband and her son. Both sides relied on custom. The plaintiff emphatically relied on *Kulachar*, but the defendant gave her own version of it, so as to show her own right and to exclude the plaintiff.

The real question in this case was whether the custom of the Ramghur Raj favours succession of the male heir or of the widow and mother. It was held on evidence that no custom, either family or local, to exclude females had been established and that the plaintiff had failed to make out his title.

In this case Markby, J., held that where the impari-ability of the dignity and estate of a Raj had its origin not in any custom, family or local, but in the peculiar character of the Raj itself and which by its very nature was indivisible, the nature of the Raj would not exclude from

¹ *Maharant Heera Nath Kooreec* W. R. 375 (1871).
v. *Baboo Burn Narain Singh*, 15.

inheritance any persons of either sex if without physical or intellectual infirmity.¹

The Pactum Raj in Chota Nagpur is admittedly an ^{Pactum Raj} imitable Raj and one in which the custom of primogeniture exists. There is also a custom that the younger sons of the Rajah are entitled to maintenance, the second being called *Hakim*, the third, *Konwar*, and the fourth, and subsequent, *Lals*, but the maintenance given according to this custom ceases with the life of the grantor and has to be renewed upon a succession to the Raj. It so happened that a Rajah, during his life time, executed two instruments in favour of his third son. Of these two instruments, one was *pon-haba mokurrari pottah* or permanent lease at a fixed rental granted in consideration of a bonus or fine, and the other a *Khorposh mokurrari pottah*, or permanent maintenance grant. The eldest son, on succeeding to the Raj, brought a suit to set aside these two instruments and for possession of the Mouzas included in them. The lower Courts having found that the instrument relating to maintenance ceased to have effect on the death of the grantor-Rajah, the other instrument was the one issue to be decided upon. With reference to this both the Deputy Commissioner and the Judicial Commissioner concurred in the finding that the plaintiff failed to prove that the granting of the *mokurrari pottah* was contrary to family custom. The general power of alienation on the part of the late Rajah was established. The High Court pointed out that

¹ *Ibid* p. 381. Markby, J., said as follows :—

"I am not aware of any definition of a Raj which will enable me to say precisely whether or not the succession in dispute in this case is properly denominated the succession to a Raj. I imagine that where the term is used, it rather represents a dignity than an estate,—though it may sometimes

be used to include an estate where that estate is appurtenant to the dignity. And from the expressions which have been currently used in the family, such as 'ascending the *gad*' 'affixing the *teeluck*' and so forth, I imagine that there was in this family some hereditary dignity and this dignity has been sometimes called a *Raj*."

it was necessary for the plaintiff, in order to succeed, to show that there was some custom which would prevent the operation of the general law and which would give a power of alienation; and the only custom proved was, that the estate descends to the eldest son to the exclusion of the other sons, and that instead of there being proof of a custom against alienation what evidence there was showed that alienation had been made. The Privy Council expressed the same views in upholding the decision of the High Court.¹

Zemindari of
Pachete.

The recognized custom of the Zemindari of Pachete in Hazaribagh is that the reigning Rajah is succeeded by his eldest son on whom the estate devolves entire. The other sons as well as the minor branches of the family receive merely an allowance for their subsistence. The reigning Rajah has full power of revoking, cancelling, altering, modifying or confirming all grants made by his predecessor. The power of making such grants is restricted, in regard to the period of the grant, to the life-time of the grantor.²

As to the persons who can claim *of right* maintenance or grant in lieu of maintenance, it has been held that no one "except a son or daughter" can claim it. Thus it has been decided that a grandson or other more remote descendant is *not* entitled to maintenance.³

Tomkohi Raj
in Saran.

The Tomkohi Raj consists of a large number of villages in the districts of Gorakhpur, Gya, and Basti, and is situate in the territory which formerly belonged to the Nawab Wazir of Oudh but was ceded to the British Government in the year 1801. It lies on the west side of the river Gandak, on the opposite bank of which lies the

¹ *Rajah Udaya Aditya Deb v. Jadub Lal Aditya Deb*, 8 I. A. 248 (1881); s. c. in High Court 5 Cal. 113.

² *Musst Maharanee v. Bene Pershad Rai*, 4 S. D. Sel Rep. 62 (1825); *Beebee Puncham Koomaree v. Maharajah Gurunarain Deo*, 6

S. D. Sel. Rep. 140 (1837); *Maharajah Gurunarain Deo v. Unund Lal Singh*, Ibid 282 (1840); s. c. in the Privy Council 5 Moo. I. A. 82 (1850).

³ *Nilmoney Singh Deo v. Hingoo Lall Singh Deo*, 5 Cal. 256 (1879); s. c. 4 Shomes, Notes 18.

Raj formerly known as the Hunsapore Raj in the district of Sarun. Both the Tomkohi and the Hunsapore estates belonged to Rajah Fateh Sahi and to his ancestors before him for many generations. After the battle of Buxar in the year 1764, the property in Sarun was confiscated by the British Government and Rajah Fateh Sahi, who refused to acknowledge allegiance to the British, was obliged to leave his estate in that territory and settle on property situate on the west bank of the river Gandak, which was formerly described as Bank Jogni. By family customs the incidents of primogeniture and impartibility were attached to the *raj-riyasat*, the younger sons receiving portions of the estate by way of "babuai" allowance. In a very recent suit for partition the plaintiffs claimed to be entitled to a share in the estate along with the defendant by right of inheritance according to the ordinary rules of Hindu law. The defence was that the estate was an imitable Raj devolving upon the death of the Rajah, in accordance with a well-established family custom upon the eldest son, the younger son or sons obtaining maintenance in recognition of his or their rights as a Baboo or Baboos ; and that the defendant, as the only son of the late Rajah, was entitled to the Raj and the plaintiffs were only entitled to Babooana or maintenance. It was held that the application of the customs of primogeniture and impartibility to the Goruckpore property was unaffected by the confiscation of the property in Sarun ; and, that even if (which, however, was found not to have been the case) the Goruckpore property had been altogether acquired after confiscation of the property in Sarun, these customs, being part of the personal law of the family, would still govern such after-acquired property.¹

The Hunsapore Zemindari in Sarun is now known as the Hatwa Raj. It is an imitable Raj and by Hunsapore or Hatwa Raj.

¹ *Surabjit Partap Bahadur Sahi v. Indrajit Partap Bahadur Sahi*, 27 All. 203 (1904).

family custom and usage, descended, for many generations, on the death of each successive Rajah, to his eldest male heir, according to the rule of primogeniture, subject to the burthen of making Babooana allowances to the junior members of the family for maintenance.¹

Sonepur Raj. According to the special custom of the family of the Rajah of Sonepur the estate of the *Kowur i. e.* the second son of the Rajah, is never divided between his younger sons. His eldest son, who bears the title of *Thakcor*, succeeds to the entire estate. The younger sons are allowed maintenance only. This custom was in issue in a case brought by the younger son against his father and the sons of his elder brother. The former based his claim on the ordinary Hindu law, the latter (*i. e.* the nephews in particular, as the father was merely a *pro forma* defendant) pleaded special family custom as stated above. The circumstances out of which the cause of action arose were these: Rajah D. gave to Kowur H. certain lands in Purgunnah Sonepur. The latter gave to his two sons each fourteen villages in the same Purgunnah. The plaintiff was the younger son. On the death of the elder son, Kowur H. made over the whole of Sonepur to his (deceased son's) sons. Thereupon the plaintiff brought this suit claiming his share of the property in dispute. In upholding the family customs the Sudder Dewany Adawlut observed that the decision of the case rested entirely upon local usage and the customs of the family of the parties concerned. The evidence in the case conclusively proved that no division was made of the Kowur's estate according to the established custom. Therefore Kowur's eldest son, the Thakoor, was entitled to succeed to the *gadi* and the entire estate.²

¹ *Baboo Beer Pertap Sahee v. Maharajah Rajendra Pertap Sahee*, 12 Moo. I. A. 1 (1867). s.c. W. R. (F. B.) 97 (1863). (See *infra*, under Impartibility, the history of

² *Lala Indernath Sahee Deyoo v. Thakoor Casseenath Sahee*, 1 S. D. Decis. 17 (1844). See 6 S. D. Sel. Rep. 260.

Baikantpur
Family in
Julpaiguri.

In the Baikantpur family, in the district of Julpaiguri, succession by adoption is contrary to the family custom. The family could not properly be called Hindu. It originally belonged to an aboriginal tribe known as *Koch*, now designated *Rajbansis*.¹ These Rajbansis affect to be equal to *chhetries*, although they have retained many usages and habits of their own which are quite irreconcileable with those of Hindus.² It may be mentioned that even in a Hindu family there may be a custom barring inheritance by adoption.³

Rajput family
of Jadan
Thakur clan
in Agra.

The Jadan Thakurs belong to a family of Rajputs, apparently numerous, the clan being known as Jadan Thakurs. The family is ancient and noble and has been in possession of the taluq or *riyasat* of Umargarh and of various villages appertaining thereto for many generations. The family property has never been subject to partition and is subject to the custom of primogeniture. In *Nitr Pal Singh v. Jai Pal Singh*⁴ the property in dispute was a taluq of zemindari villages in the district of Agra and Etah held for many generations by this joint family of the Jadan Thakurs. The disputants were step-brothers. It was contended by one side that the succession should be governed by the ordinary rules of Hindu law and the other side asserted that the ruling principle was the family custom, according to which the whole *riyasat* of the family was *tikait* (meaning thereby, was exceptional as being the property of an individual marked with the *tika*) and was impartible; and the estate descended by a rule of primogeniture. Upon evidence it was found

¹ See Dr. Hunter's Statistical Account of Darjeeling about Kochs, and the Baikantpur family.

² *Fanindra Deb Raihet v. Rajeswar Dass*, 12 Moo I. A. 72 (1884): S. C. 11 Cal. 493.

Ram Churn Majmoodar, S. D. Decis. 20 (1850). See also *Sri Raja Rao Venkata Mahapati Surya Rao v. Sri Raja Rao Gangadhara Rana*, 13 I. A. 97 (1884) : s. c. 9 Mad. 499.

⁴ 23. A. 147 (1896). S. C. 19

³ *Rajah Bishonath Singh v. All. 1.*

that there was a family custom according to which the ancestral property descended as an imitable estate and should be possessed by a single heir at a time who should be the eldest son.

Abhan Thakurs of Oudh.

The Abhan Thakurs are said to have migrated from Gujrat some five hundred years ago and settled down in Sitapur and the borders of the Barabanki districts of Oudh. In Gujrat the Mayukba is recognised as an authority of permanent importance when it differs from the Mitakshara. According to the Mayukha, the sons of a brother who is dead share along with the surviving brothers. The rule, however, as found in the Mayukha, does not go beyond brothers and brothers' children. Although the migration of the Abhan Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom. In *Chandika Baksh v. Muna Kunwar*¹ the right was claimed in favour of more distant descendants than brothers under an alleged family custom, which was contended to be a legitimate and natural extension of the Mayukha doctrine. To prove this alleged custom eighteen instances of succession were adduced, of which only four, of a comparatively modern date, were to the point. The Privy Council in dismissing the appeal remarked: "It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation."

Patia Raj in Cuttack.

It is contrary to the custom of the Patia Raj, in Cuttack, for the holder of the Raj to alienate the property of the Raj when he has a brother as his heir.²

¹ 20 I. A. 70 (1901) : s. c. 24 All. *Rajah Dibbya Singh Deb*, 9 C. W. 273 : s. c. 6 C. W. N. 426. N. 330 (P. C.) (1904).

² *Gopal Prosad Bhakat v.*

According to the family usage and custom for eight generations the property, Ilaka of Rawutpore, in the district of Cawnpore, descends entire to the eldest son to the exclusion of other sons. Younger brothers cannot claim partition of the estate which is indivisible and devolves on the eldest son.¹

Ilaka of Raw-
utpore

A *kulachar* to the effect that the Seohur Raj in Tirhoot is an imitable estate and the Rajah for the time being appoints one competent member of the family to succeed him on the *gadi* as Rajah and that the entire property passes with the Raj from Rajah to Rajah, the other members of the family being entitled to maintenance only—was not proved. It was held that the *status* of the family had none of the characteristics of a Raj and that the head of it became a Rajah in fact and truth for the first time when the title was conferred by Lord Canning.²

Seohur Raj
in Tirhoot.

The talukdari estate of Katyari is situate in the district of Hurdui, in Oudh. According to the custom of the family, a daughter's son does not succeed to the property of his maternal grand-father.³

Talukdari
Estate of
Katyari.

Regulation XI of 1793 provides that after the 1st of July, 1794, if any zemindar shall die without a Will, &c., and leave two or more heirs, who by Mahomedan or Hindu law (according as the parties may be of the former or latter persuasion) may be respectively entitled to succeed to a portion, such heirs shall succeed. Regulation X of 1800 enacts that Regulation XI of 1793 will not operate in the Jungle Mahals of Midnapore and other districts where a custom exists by virtue of which the succession to the

Reg. XI of
1793 and Reg.
X of 1800 ;
their effect on
family cus-
toms.

¹ *Rawat Urvun Singh v. Rawat* L. R. 310 n. (1871).

Ghunsiam Singh, 5 Moo. I. A. 169 (1851).

² *Kunwar Samwal Singh v. Rani Satrupa Kunwar*, 10 C. W. N. 230, (P. C.) (1905).

³ *The Court of Wards v. Raj-
kumar Dio Nandan Singh*, 9 B.

landed estates invariably devolved to a single heir without the division of property. It, therefore, only partially repeals Regulation XI of 1793. The custom alluded to was concerned with extensive zemindaris or principalities, not with petty estates.¹ In *Rajah Deedar Hossein v. Ranees Zuhoor-oon Nissa*,² it was held that the family usage that a zemindari has never been separated but devolved entire on every succession, though proved to have existed for many generations, will not exempt the zemindari from the operation of Regulation XI of 1793, which provides in case of intestacy, for the division of landed estate among the heirs of the deceased according to the Mahomedan or Hindu law. Regulation X of 1800 does not apply to undivided zemindaris, in which a custom prevails, that the inheritance should be indivisible, but only to *Jungle Mahals*, and other entire districts where local customs prevail; and therefore only partially, and to that extent, repeals Regulation XI of 1793.

In *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh*,³ their Lordships observed: "Now, it is said in this case, that there is no positive law which excludes the divisibility of this inheritance, unless it be clearly proved to be an ancient *Raj*, which it is denied that it is. But Regulation XI of 1793 really has no bearing upon the case, for the Regulation of 1793 is confined to cases in which there is no deed and no Will executed. Where there is a deed, or where there is a Will, it does not give a validity to that deed or that Will, which the deed or Will would not otherwise possess, but it leaves it precisely where it stood before." As it was alleged that there was a deed in this case, their Lordships were of opinion that Regulation XI of 1793 had no application and far less that of X of 1800.

In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*,⁴ the Privy Council held that Regulation XI of

¹ *Kali Dass Mitter v. Harish* (1855).

Chandra Laik, 2 Sev. 157.

² 12 Moo. I. A. 1, (1867): s. c., 9

* 2 Moo. I. A. 441 (1841).

W. R. 15.

* 6 Moo. I. A., 164 at p. 187.

1793 did not affect the succession, by special custom, of a single male heir to a *Raj* or subject it to the ordinary Hindu law of succession, nor can it alter the character of the grant made in 1790.

In *Rajkishen Singh v. Ramjoy Surma Mazoomdar*¹ the previous three cases were referred to and their Lordships observed as follows :—“ Regulation XI of 1793 has been held not to be applicable to the succession of a well-established Raj (and here referred to 12 Moo. I. A., 1 and 6 Moo. I. A., 164). But the respondents contend that, notwithstanding the qualification placed upon it by Regulation X of 1800, it did not govern a case like the present, where the claim rests only on a *continuing family usage*, and not on the peculiar character of the zemindari itself or on a local or district custom; see *Rajah Deedar Hossein v. Rauec Zahooroon Nissa*.² Their Lordships did not think it necessary to give any opinion on the positive effect of Regulation XI of 1793, for they thought that, in the present case, there was sufficient ground for the presumption that after the settlement and this Regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.” Whether the Regulation XI of 1793 or Regulation X of 1800 would govern a case where the claim rested only on a *continuing family usage* was left undecided in this case.

In a very recent case³ the High Court of Calcutta had occasion to consider the existence of the rule of primogeniture in the district of Cuttack and observed : “ It is true that by Regulation XI of 1793 the Legislature, after referring to a custom which had grown up in consideration of

¹ 1 Cal. 186 at p. 192 (1872).

v. *Ram Kanta Das Mahapatra*

² 2 Moo. I. A. 441 (1841).

32 Cal. 6 at p. 11 (1904).

³ *Shyamanand Das Mohapatra*

financial convenience, and by which some of the most extensive zemindaris devolved entire to the eldest son, enacted that in future the landed property of all zemindars and independent talukdars should devolve, on their death, according to the ordinary rule of succession prescribed by Mahomedan or Hindu law. In a Regulation, however, passed a few years later, X of 1800, it was observed that 'a custom had been found to prevail in the Jungle Mahals of Midnapore and other districts by which the succession to the landed estates invariably devolves to a single heir without the division of property'; and it was enacted that 'Regulation XI of 1793 shall not be considered to supersede or affect any established usage in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir to the exclusion of other heirs of the deceased'." Then their Lordships went on and held that by s. 36 of Regulation XII of 1805, passed two or three years after Orissa had come under British rule, all the Regulations in Bengal, not superseded by the special rules laid down in that Regulation, were extended to, and declared to be in force in, the zillah of Cuttack. Thus in that case it has been held that the rule of primogeniture prevails in the district of Cuttack in which by established usage succession to an entire estate devolves to a single heir *provided* the rule is shown to have been in existence at the time of Regulation XII of 1805, and has not since been departed from.

Regulation XI of 1793 does not affect the estate where the proprietor died before the Regulation came into force.¹

As to the application of the provisions of Regulation X, of 1800, see *The Widows of Raja Zorawur Singh v. Koonwur Pertee Singh*².

¹ *Koonwar Bodh Singh v. Seo-nath Singh*, 2 S. D. Sel. Rep. 116, (1813).
² 4 S. D. Sel. Rep. 57 (1825).

Where the property in dispute is partly ancestral and subject to family usage, and partly acquired and subject to the ordinary Hindu Law of Inheritance, it is quite consistent that one rule should be applied to that part of the property which has descended, during some generations, under established custom, to the elder member of the family, and that another should prevail for such other property as has been more recently acquired and to which the necessity of applying the previous custom of the family is not made apparent.¹ But if the owner of an estate, the devolution of which is governed by family custom, acquires separate property but does not in his life-time alienate the property so acquired, or does not dispose of it by his will or leave behind him some indication of a contrary intention, the presumption will be that he intended to incorporate it with the family estate. Under such circumstances the self-acquired property will be governed by the family custom which is part of the personal law of the family.²

In *Muhammad Ismail Khan v. Fidayat-un-nissa*,³ Spankie, J., speaking of a family custom says : "It must have had a legal origin and have continuance and whether property be ancestral or self-acquired, the custom is capable of attaching or being destroyed equally as to both."

It is an undisputed fact, and it stands to reason, that a descent of property may be regulated by *Kulachar* existing in a *Raj* as well as in a petty family. It would be absurd to ignore, or not to recognize, such custom in the case of the latter because it happened to be a small property. As long as a custom satisfies all the requisites of a good custom and is not opposed to ordinary reason or public policy, it must be given effect to irrespective of

Ancestral and
acquired
property.

Whether a
petty family
can set up
a custom
of descent
like that of
a Raj.

¹ *Annan Santra v. Dusrutta Sahi v. Indrajit Partap Bahadur Opardha*, 14 S. D. Deci. 989 *Sahi*, 27 All. 203 (1901).

(1858). ³ 3 All. 723 at p. 730 (1881).

² *Sarabjit Partap Bahadur*

the consideration that it attaches to a large or small estate, to a Raj or to a petty family. Its immemorial and uninterrupted existence gives it a sanctity which should not be lightly violated by the mere reason of the magnitude of the estate or the *status* of the family. With great deference, therefore, we beg to differ from the observations of the learned Judges in *Basvantrav Kidingappa v. Mantappa Kidingappa*,¹ who, referring to the cases of *Rawut Urjun Singh v. Rawut Ghuniam Singh*² and *Gunes Dutt Singh v. Moharajah Moheshur Singh*,³ said :—“In both these cases the subject-matter was a Raj or Principality which descended undivided to the eldest male heir during several generations. And the same law would unhesitatingly be applied to some classes of Thakurs and Chiefs in the Bombay Presidency among whom, by settled custom, the Principality descends indivisible to the eldest son. But it would be a dangerous doctrine that any petty family,—and in the case under consideration a third of the family property is valued for the purposes of the suit at little more than five hundred rupees—is at liberty to make a law for itself and thus to set aside the general law of the country.” In this case the second of the three sons of one Kidingappa brought a suit to recover from his elder brother a third share of the *inam* lands and other properties. His claim was opposed on the ground of a family custom according to which, it was alleged, the plaintiff was entitled to maintenance only and not to any share in the lands, that partition had not been allowed in the family for several generations the eldest member succeeding to the whole of the property. The High Court found the evidence in support of the alleged custom insufficient and so dismissed the appeal. It would appear that the italicized portions of the remarks of the learned Judges were mere *obiter dicta* as the case was dismissed on a quite

¹ 1 Bom. H. C. R., 42 (1865).

² 6 Moo. I. A. 164 (1855).

³ 5 Moo. I. A. 169 (1851).

different ground, *viz.*, the alleged custom not having been proved. These *obiter dicta*, however, were considered in another case.¹ In that case the family was a Desai family and it set up a custom of primogeniture. The Court held that if the custom was clearly proved, it would supersede the general Hindu law. Here the learned Judges distinguished the above Kidingappa case by remarking that there "the family did not belong to any particular class or section of the community and that the custom set up was that of a *single family*." "In the present case," continued the learned Judges, "the family are *Desais* and belong to a class who, at one time, at least, occupied an important position in this (Bombay) Presidency and, further, the alleged custom would appear from Steele's work on the Laws and Customs of Hindu Castes in the Deccan Provinces to be in accordance with a very general usage of that class of hereditary offices." Their Lordships similarly distinguished a Madras case² which held that a *single family* could not set up a particular custom in derogation of the general law. It is difficult, however, to reconcile this view with the remarks of the Privy Council in *Soorendranath Roy v. Heeramonee Burmoneah*³ and *Serumah v. Palathan*⁴ where their Lordships recognized the possibility of a family custom being proved, adding that it should be distinctly proved. Further, in *Mahommad Azmat v. Lalli Begum*,⁵ the custom of a particular family disallowing widows to inherit was recognized by the Calcutta High Court and approved of by the Privy Council. In a case from Bhagalpore⁶ the Privy Council has laid down that a custom of descent according to the law of primogeniture may exist by *Kulachar* or family custom, although the estate

¹ *Shidhofirav v. Naikojirav*, 10 Bom. H. C. R. 228 (1873).

² 12 Moo. I. A. 81 at p. 91 (1868).

⁴ 15 W. R. (P. C.) 47 (1871).

³ *Sri Rajah Yenumula Gavuri-devamma Garu v. Sri Rajah Yenumula Ramandora Garu*, 6 Mad. H.C.R. 93. (1870).

⁵ 8 Cal. 422 (1881).
⁶ *Chowdhry Chintamun Singh v. Nowlukho Konwari*, 2 I. A. 263 (1875).

may be neither a Raj nor a polliam. This case was followed in *Shyamanund Das Mahapatra v. Ram Kanta Das Mahapatra*.¹

These last cases, we venture to say, have put the matter beyond all doubt and settled the rule once and for all.

Family arrangement

How far a family arrangement can be upheld is a matter worth some consideration. In *Banee Pershad v. Maha Bodhi*² it was held that in the district of Tirhoot under the *Mitakshara* a widow cannot, as of right, hold as the heir of the deceased brother of her late husband, though she may, by family arrangement, be permitted to do so. In the very latest Privy Council decision³ their Lordships were of opinion that an unbroken usage for a period of 19 years was conclusive evidence of a family arrangement to which the Court was bound to give effect. Here the arrangement in question was in respect of the office of manager of a Hindu temple. The office was hereditary in a family, having no beneficial interest in the property or in the income of the temple. The office of manager was formerly vested in one M., on whose death it devolved on his eight sons (four sons by each wife) by his two wives. Each of these eight male descendants continued to hold the office for one year alternately. After some years, there having arisen disputes as to the order in which the issue of the first wife should manage the temple, they, by a written agreement, settled it amongst themselves. About this time the members of the junior branch relinquished their claim to the office in favour of the senior branch. During the 19 years immediately preceding the institution of this suit, in each cycle of eight years there had been a settled order of suc-

¹ 32 Cal. 6 (1904).

gappa Chetti, 83 I. A. 139 (1906) :

² 8 Wyman 189 (1886).

s.c. 10 C.W.N. 825.

³ *Ramanathan Chetti v. Maru*.

sion among the senior members of the branch. The arrangement, their Lordships thought, was "perfectly a proper arrangement conduced to the due and orderly execution of the office. It was one which the Court would no doubt have sanctioned if its authority had been invoked. It was one which the parties interested were competent to make without applying to the Court. If the applicant wishes to set it aside and to have a new scheme settled, he must take proper proceedings. If he has any ground for attacking the management of the temple or administration of the property attached to it the Courts are open. But it is not for him, at his will and pleasure, to disturb an arrangement of which he has on more than one occasion taken the benefit. It is plain that the arrangement was not intended to be merely temporary nor can it be regarded as precarious. It must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested."

In *Helan Dusi v. Durga Das Mundal*¹ the question came up before the Calcutta High Court and one of the learned Judges observed thus :—"A family arrangement may be upheld, although there were no rights actually in dispute at the time of making it, as the Courts will not be disposed to scan with much nicety the question of the consideration. Lord Chelsford, L. C., observed that it is a mistake to suppose that the doctrine of family arrangements extends no further than arrangements for settlement of doubtful or disputed rights, and proceeded to hold that the principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property....Nor can any weight be attached to the circumstance that the family arrangement has been in opera-

¹ 4 C.L.J. 323 at p 331. (1906).

tion for a short period of time only ; the validity of arrangement does not depend upon the length of time for which it has been acted upon....If an attempt is made to set aside a family arrangement on the ground of mistake, inequality of position, undue influence, coercion, fraud, or any similar ground the length of time during which it has been allowed to stand unchallenged, may be a material element for consideration."

The principle to be derived from these cases is that a family arrangement may be upheld where it is made for the preservation of peace and property of the family. No court will disturb such arrangement unless it is clearly shown that a better arrangement will be made or that the old arrangement was made under circumstances which were not in consonance with equity and justice. No particular member of the family, at his will and pleasure, can disturb the arrangement to which he has been a party and in the benefit of which he has participated. But such arrangement cannot certainly have the force of a custom which, when clearly proved, supersedes the law. No family has a right to make its own law of succession. But it can make arrangement among the members of the family which is conducive to the general good without violating the ordinary law of the country.

Where it is
not a family
arrangement
but a family
custom.

In *Ramrao Trimbak Deshpande v. Yeshovantrao Madhanrao Desphande*,¹ which was a suit for partition of the *Deshpande Vatan*, the plaintiff contended that the services and the greater portion of the *Vatan* were entrusted to the defendant's ancestors for the sake of convenience, with the consent of all, maintenance being allotted to the younger branches; but that, now that the services had been abolished, there was no longer any necessity for that arrangement and that the property should be partitioned. The evidence conclusively showed that it had been the practice in the family, extending over a century and more before any

dispute arose between the elder and younger branches, to leave the performance of the services of the *Vatan* and the major part of the property in the hands of the elder branch, and to provide the younger branches with maintenance only, which, by its nature, was not fixed and permanent. As to whether the practice was the result of an established custom as stated by defendants or only an arrangement, (as West, J., says),¹ "by mutual assent for peace or convenience," their Lordships thought that, though there was no direct evidence on the subject "this practice which has been undoubtedly in force during a very long period extending over, probably, a century and a half, without interruption, or dispute of any kind, is more probably due in its origin to a custom, such as is alleged by the defendants, than to a mere arrangement determinable at the will of any members of the family, more especially when it is remembered such a custom is of general usage in the Deccan as shown by the passage in Steele's Work on the Laws and Customs of Hindu Castes in the Deccan Provinces, p. 299 referred to in the judgment in *Shidhojirav v. Naikjirav*, 10 Bom. H.C.R. at p. 232." Their Lordships accordingly held that the plaintiff could only claim maintenance.

*Gopalrav v. Trimbakrav*² was another case where the parties wanted the partition of the ancestral *deshmukhi* and *patelki Vatan*. Of the three brothers, the first defendant was the eldest and resisted the partition on the ground that, by a custom of the family, the eldest son took the *Vatan* and provided the younger members of the family with allotments by way of maintenance. The Court found upon the whole evidence, that the existence of a custom of eldership, as alleged by the first defendant, had been satisfactorily established, that it was not a mere arrangement for convenient performance of the services of the *Vatan*.

¹ Vide *Bhau Nanaji Utpat v.* at p. 277 (1874).

Sundrabai, 11 Bom. H. C. R. 249

² 10 Bom. 598 (1886).

Ordinary law prevails if *kulachar* not established.

It is superfluous to say that, when alleged *Kulachar* is not established, the ordinary law takes its course. Thus, where one party claimed a moiety of a zemindari under the ordinary rules of the Hindu law of inheritance, and the opposite party pleaded a family custom to the effect that the landed property invariably descended to the eldest son, or in failure of issue, to the next male heir in exclusion of all other heirs, but failed to establish the existence of the alleged family custom, a decree was given for the plaintiff.¹ Similarly, where the allegation was that succession was regulated not by the Mitakshara, but by a certain *Kulachar* whereby elder brothers enjoyed special advantages as heads of families, and widows were incapacitated from taking possession to the prejudice of male heirs, and the alleged custom was not established, the plaintiff, who sued to succeed to her husband's estate, was declared her husband's heir.² Instances can be multiplied.³

The ordinary law of descent and disposal applies also to lands where a particular custom concerning them has been abandoned,⁴ or where they have passed into a family not subject to the custom.⁵ Where service lands (Vatan estate) are freed from obligation of public service and when there is no concurrent family custom operating to keep the estate together, the lands become subject to the ordinary law of descent and disposal.⁶

¹ *Raja Koernain Roy v. dhum Sing*, 2 S. D. Sel. Rep. 147 (1814); *Dhronidhar Roy, S. D. Decis.* 1132 (1858).

² *Baboo Bhowany Sohye Singh v. Ooday Pertap Sing*, 1 Hay 205 (1862).

³ See the following cases amongst others : *Pertaub Deb v. Surrup Deb Raikut*, 2 S. D. Sel. Rep. 249, (321) (1818); *Mantappa Nadgowda v. Baswuntarao Nadgovda*, 14 Moo. I. A. 24 (1871); *Somrun Singh v. Khe-*

⁴ See West & Bühler H. L. 744.

⁵ *Shewval Dhurmchand v. Bhaichand Luckowbai*, 7 Harr. S.

D. Sel. Rep. 195; *Abrahom v. Abraham*, 9 Moo. I. R., 195 at p. 242 (1863); *Sovrendra Nath Ray v. Heeramonee Burmoneah*, 12 Moo. I. A. 81 at p. 91 (1868).

⁶ *Radhabai v. Anantrar*, 9 Bom. 198 (F.B.) (1885).

CHAPTER II.

LOCAL CUSTOMS.

The peculiar law of a country prevailing from time immemorial without conflict with the Vedas is called *Desachar*, or local or territorial custom.¹ It is the *lex loci*, which, unlike a family custom, binds all persons within the local limits in which it prevails.²

A local custom being exceptive in its nature must be pleaded with reasonable certainty.³ To establish a local custom in a certain district, the district must be stated and described geographically, in which the custom is now, and for a long time has been, prevalent, and which includes the property in question. A sufficient number of instances of the particular custom within that locality must then be adduced to prove that it extends to the whole district and therefore governs the question in dispute. Until some connection, geographical or political, is shown to exist between two districts there is no ground for inferring the existence of a custom in one district from its existence in another.⁴

In order to prove a local custom to be invariable it is not necessary to show that the particular custom has been resisted unsuccessfully, or that there has been litigation in regard to it. Litigation is a test of the existence of a custom but not the sole proof of it.⁵

The following are some of the instances of local customs prevalent in various parts of the country :—

¹ *Katyayana* cited in the *Viramitrodaya*.

² *Rajkishen Singh v. Ranjoy Surma Mozoomdar*, 1 Cal. 186 p. 195 (P. C.) (1872).

³ *Storm v. Hamfray, Tay and Bell* 331, p. 387, (1850),

⁴ See per Markby J. in *Maharani Heeranath Kooaree v. Baboo Burm Narain Singh*, 15 W. R. 375 (1871).

⁵ *Hurromohun Mookerjee v. Lalunmoy Dassee*, 1 Wyman, Part II, 36 (1886).

Hug Jethansi or Right of Eldership.

Hug Jethansi or *Jestangsha* is the right of the elder or the first born son to get a larger share of the ancestral property than that of his younger brothers.¹ It would seem that this right of primogeniture, which was recognized by the ancient Hindu law, is of no force in the present day, except where family or local custom sanctions it.² Consequently we find that where, in a case from Shahabad, the plaintiff sought to obtain possession from his younger brother of $7\frac{1}{2}$ per cent. of the moiety of landed property which devolved on him by inheritance from the father, in right of *Jethansi*, his claim was disallowed on proof that *Jethansi* was not authorized by law.³ In another case from Patna it was similarly held that, in a division of property among Hindus, priority of birth did not entitle to a larger portion.⁴ In *Chowdree Jununjoy Mohapatra v. Pursottum Pandah*,⁵ the plaintiff sought to recover possession of his share in the family property, real and personal, and some of the defendants pleaded that the estate had been divided by arbitration and that the rest of the property claimed was self-acquired. It was further pleaded that this arbitration was conducted according to a family custom under which the eldest son received, by right of primogeniture, a double share of the property. But as the defendants failed to establish the alleged custom, plaintiff's claim was allowed.

Jesthangsha may not be authorized by Hindu law, but the custom of granting the eldest born an additional share over and above that of his other brothers is prevalent in many parts of India. This is apparently for "his services in managing the family property and in acquiring other property and so increasing the value of the family estate."⁶

¹ See Wilson's Glossary p. 237.

² Vide, Sir William Jones's Institute of Manu.

³ *Sheo Buksh Singh v. The Heirs of Futtah Singh*, 2 S. D. Sel. Rep. 340 (265) (1818).

⁴ *Tuliwar Singh v. Puhluwan Singh*, 3 S. D. Sel. Rep. 301 (1824).

⁵ 14 S. D. Decis. 848 (1858).

⁶ *Manick Chand v. Hira Lal*, 20 Cal. 45 at p. 47 (1892).

Huq Chaharan is the right of a landlord, based on local custom, to receive one-fourth of the purchase-money when a house in a village is sold. In a Full Bench Case of the N. W. P. High Court it was laid down that where, by custom, the zemindar is entitled to a quarter share of the sale-proceeds of his *huq zemindari*, he is entitled to recover it on the occasion of sales either absolute or originally conditional but subsequently becoming absolute by foreclosure, from the vendor and the purchaser, and the latter cannot be discharged from his liability by proving that he has paid all including zemindar's dues to the former, it being incumbent on him to see that the zemindar is satisfied in respect of his dues.¹

Whether a zemindar's customary due extended to public sales by auction was the point for decision before a Full Bench of the Allahabad High Court. There a house was sold in execution of a decree. The zemindar sued the decree-holder for one-fourth of the sale-proceeds. The Lower Courts dismissed the suit on the ground that, although the plaintiff had proved that the custom set up by him existed in the case of private sales, he had failed to prove that it existed in the case of sales in the execution of decrees. The Full Bench held that the proof of a custom, whereby the zemindar of the village is entitled to one-fourth of the purchase-money when a house in the village is sold privately, is not proof of a similar custom in respect of sales in the execution of decrees.²

There is in existence in old reports a large body of rulings in reference to the respective rights of a *purohit* and a *yajamana*. The term *purohit* means a family priest and a *yajamana* is his employer. A *purohit* belongs to the Brahman class and for his services and ministrations to the family of his *yajamana*, in performing religious

Huq Purohit.

¹ *Heera Ram v. Hon'ble Sir Kalian Das v. Bhagirathi, 6 Raja Deo Narain Singh, Ag. H. C. (Full Bench Rulings) 63 (1867).*

² *Kalian Das v. Bhagirathi, 6 All. 47 (F.B.) (1883).*

ceremonies or religious worship, he receives certain remunerations. Sometimes such relationship continues for generations and becomes quite hereditary. Owing to this peculiar relationship of the two, certain customary rights have sprung up through ages of usages and practices, and those rights were claimed by the one or the other of the parties in litigating with each other for the enforcement of such rights. In many of these disputes between priest and *yajamana*, the Civil Court had to determine whether they were cognizable by the Courts of Law. Generally, as the privileges claimed or denied by the parties involved a mere personal right and not a civil one, the court had to non-suit them.

*Yajamana's
right to select
his own priest.*

The *yajamanas* have a right to select their own priests but no suit to enforce the claim will lie in the Civil Courts.¹ But "if the holder of an office was entitled by law to claim dues from the inhabitants of certain places, and a person could establish that he, by right of inheritance, was entitled to fill that office, probably the Civil Courts would defend his right against any disturbance of it."² The obligation of the *yajamanas* to employ a particular *purohit* is a mere matter of conscience and not an obligation which a court can enforce.³ But having selected and employed a priest a *yajamana* cannot discard him in the absence of any disqualifying cause.⁴

*No hereditary
right to a
priest's fees.*

Since the *yajamanas* are at liberty to choose their own priests to perform ceremonies no third party who has not performed them can, on proof of hereditary right established by custom, claim the fees either from the *yajamanas* or from the priest who received them.⁵

¹ *Beharee Lal v. Baboo*, 2 Ag. H. C. R. 80 (1867); followed N.-W. P. Decis. 314 (1862).

² *Ibid* p. 80.

³ *Damoodur Misser v. Roodur-mar Misser*, 1 Hay 365 s.c. 1 Marshal 161 (1862).

⁴ *Musst. Chowrassée v. Jeewun*

Mohun Chuckerbutty, 5 S. D. Decis. 428 (1849); *Hurgobind Surma v. Bhowaneepereshad Shah*, 6 S. D. Decis. 296 (1850); *Rama Kant Surma v. Gobind Chunder Surma*,

A claim by a priest to the fees bestowed on him by his *yajamana* is not enforceable in a Civil Court, but his claim connected with rights or fees collected at shrines or temples from pilgrims is cognizable by the Civil Courts. Such claim may include his rights connected with religious worship, which are not rights over persons, but referring exclusively to his ministration within a temple or religious building, together with the exclusive receipt of offerings made by any parties who may choose to resort to such temples.¹ In this case a distinction was drawn between "offerings on festive and other occasions" and "offerings at shrines and temples." A series of decisions ruled that, for the former description of cases, a suit in a Civil Court will not lie, while for the latter they will. Thus, in a case where the suit was for a fractional share of offerings presented at a shrine and the suit was dismissed by the Lower Court, the Sudder Court held, following the above decision, that the suit was cognizable in a Civil Court and that the precedent cited by the Lower Court related to "offerings on festive and other occasions" and was not applicable to the present case. The decision of the Lower Appellate Court was reversed and the case was remanded for trial on its merits.²

In *Damoodur Misser v. Roodnurmar Misser*,³ the suit was brought by a *purohit* against another *purohit* for an interference by the latter with plaintiff in the exercise of his alleged exclusive right of performing certain ceremonies for the people residing at the places named in the plaint, and receiving certain donations or payments in respect of such performance. It was held that the plaintiff had no

Priest's right
to fees collect-
ed at shrines.

*Purohits' ex-
clusive right.*

¹ S. D. Decis. 898 (1852); *Bog Pershad* 4 N. W. P. Decis. 720 *Thakoor*, 4 Sevestre 673 (1857); *(1861).*

Rance Sadut Koour v. Jovilla Pershad, 4 N. W. P. Decis. 720 (1861). ² *Ussalut-oon-nissa v. Ruhim Buksh* 4 N.W.P. Decis. 767 (1861).

See the cases cited in the last case. ³ 1 Hay 365 (1862): s.c. 1 Marshal 161.

¹ *Rance Sadut Koour v. Jowalla*

right of suit as no legal right, either of property or person, appeared to have been infringed.

In a case from the Madras Presidency the representatives of the *Arya Brahmins* claimed, in hereditary right, the *Mirassi* and exclusive privilege of administering *Purohitam* (religious rites and ceremonies) to seventeen classes of pilgrims who resort to the shrine of the great *Pagoda* and of the temples in the island of Ramaswaram in Madura. The suit was dismissed as the plaintiffs failed to establish their right either (i) by documentary proof of its origin, or (ii) by proof of such long and uninterrupted usage as, in the absence of documentary proof, would suffice to establish a prescriptive privilege.¹

Priest wrongfully receiving fees.

Where a priest wrongfully officiates for another and receives fees, he is bound to account for them to the rightful priest, where such fees are by custom attached to the office. Couch C. J. said : "It is settled law that if a person usurps the office of another, and receives the fees of the office, he is bound to account to the rightful owner for them ; where the payments are merely voluntary the case is different, and no suit can be brought....It is contrary to equity to make the *yajamanas* pay twice. The parties who have wrongfully received the fees are properly liable to pay them over to the parties entitled to them."²

Sale of a priestly office whether valid.

Whether a sale of the priestly office would be valid was a point for determination in the last instance. But in that case the purchasers were "grandchildren who would eventually have succeeded to the office as heirs." And the grandfather did nothing more than relinquish his right in their favour. Further, there had been previous dealings with this office of a somewhat similar nature, which was some evidence of a usage justifying the alienation. Consequently the sale was upheld. But whether such sale to *strangers*

¹ *Ramaswamy Aiyan v. Venkata Achari*, 9 Moo. I. A. 344 at p. 384 (1868).

² *Sitarambhat v. Sitaram Ganesh*, 6 Bom. H.C. B. 250 (1868).

would be valid or not remained undecided, as the court did not discuss that point. It would seem, however, that an alienation of a priestly office to strangers would be objectionable on several grounds. Apart from the consideration of public policy such sales would infringe the rights of a *yajamana*, to select his own priests.

The right of pre-emption is "a right to acquire by compulsory purchase, in certain cases, immovable property in preference to all other persons."¹ According to the Hindu law there is no right of pre-emption either in the schools of Bengal, Benares or Mithila. It is essentially a Mahomedan doctrine; but being well-suited to the communal life of village communities, it is very widely extended among non-Mahomedans by local usage. It is prevalent not only among the Hindus but also among the Buddhists living in Burma; not only in Bengal, Behar and Orissa, but also in the Punjab, Bombay and Malabar.

Huq Shufa
or
Pre-emption.

When the right of pre-emption has been shown to exist, it is presumed to be founded on, and governed by, the Mahomedan law, unless the contrary be shewn. Where its existence among non-Mahomedans has not been judicially noticed, it must be proved by the person who asserts it. The court may, as between Hindus, modify the law regarding the circumstances under which such right is claimed, and not regarding the preliminary forms.²

The right of pre-emption arises from a rule of law by which the owner of the land is bound; and it exists no longer, if there ceases to be an owner who is bound by the law either as a Mahomedan or by custom.³ It arises by reason of

Wilson's Anglo-Mahomedan Law p. 394. See also *Gobind Dayal v. Inayatullah*, 7 All. 775 (F.B.) at p. 799 [1885] for a definition of *Pre-emption* as given by Mahmood J.

baksh, B.L.R. (Full Bench Rulings) 35 (1863).

⁴ *Hurree Churn Surmah v. Thomas Ackroyd*, 18 W. R. 444 (1872); *Bijan Nath Pershad v. Kripalmoni Singh*, 24 W. R. 95 (1875).

⁵ *Fakir Rawot v. Sheikh Imam*.

vicinage or co-parcenership ; where either of these causes does not exist the right does not exist either. In Macnaughton's "Principles and Precedents,"¹ it was laid down that the right of pre-emption can be claimed on the following grounds, in the order enumerated—*a partner in the property sold* ; *a participator in its appendages* ; and *a neighbour*. But no right of pre-emption arises where the sale, being not *a bona fide* one, is but a sham transaction.²

The right of pre-emption is not annexed to the land so as to continue to affect it when it has been transferred to a person not bound by the law. The right, also, is not one in the pre-emptor.³

Holloway C. J. made the following observations regarding pre-emption, which are worth quoting :—"The so-called pre-emption of Mahomedan law resembles the Retract-recht (*jus retractus*) of German Law. It is an obligation, attached by written or customary law to a particular status which binds the purchaser from one obliged to hand over the object-matter to the other party to the obligation on receiving the price paid with his expenses. The action, in German as in Mahomedan law, is exercisable at the moment at which the property is handed over to the purchaser (Gerber s. 175 *et seq.* Deutsch-Priv-Recht).

"The right *ex jure vicinitatis* was one of six sorts and, like all the rest, was based upon a notion that natural justice required that such preference should be accorded to certain persons having specific relations of person or property to the vendor. It was once, as an enthusiastic Germanist admits, so used as to put the most unreasonable restraints upon the right of alienation. With more enlightened notions of the public weal, nearly every trace of it has disappeared, and it can no longer be considered a principle of the common law of Germany. While it

¹ p. 47, Edn. Cal. 1825. (Cited in 1 W.R. 234 at p. 235).

² *Parsath Nath Tewari v. Dhanai Ojha*, 9 C.W.N. 874 (1905).

³ *Per Couch C. J. in Poorn Singh Monipore v. Hurry Churn Surma*, 10 B. L. R. 117 at p. 121 (1872) : 8.C. 18 W. R. 440.

existed the antidote to its lawful influences was, as in Mahomedan law, the favouring of subtle devices for its defeat and the attaching of short periods of prescription to its exercise. It cannot be equity and good conscience to introduce propositions which the history of similar laws shows by experience to be most mischievous. If introduced at all, it must apply to all neighbours. The Mahomedan law binds Mahomedans no more than others except in the matters to which it is declared applicable. It is then law because of its reception as one of our law sources in the matter to which it applies. Where, however, not so received, it can only be prevailing law because consistent with equity and good conscience.”¹

Whenever a Mahomedan seeks to enforce his right of pre-emption against a Hindu he must clearly establish a prescriptive usage and local custom. For a Hindu defendant is not bound by the Mahomedan law in a case involving the right of pre-emption, which is a right unknown to the Hindu law.²

In the Madras Presidency the right of pre-emption is not recognised even as between Mahomedans except by local custom, as in Malabar.³ In the Punjab and Oudh, the right of pre-emption is regulated by statutes. There is no distinction between Mahomedans and non-Mahomedans as regards the right of pre-emption.⁴ In other parts of India the law of pre-emption is often modified by local customs, defined and confirmed by agreement by the land-holders of the village, or district, and embodied in the settlement record, called Wajib-ul-urz.⁵

¹ *Ibrahim Saib v. Muni Mir* (1870); *Krishna Menon v. Kesaran, Udin Saib*, 6 Mad. H. C. R. 26 20 Mad. 305 (1897).
at p. 31 (1870).

⁴ See the Punjab Laws Act XII

² *Sheraj Ali Chowdhry v. Rumzan Bibee*, 8 W. R. 204 (1867): of 1878 and Oudh Laws Act XVIII
S. C. 2 Ind. Jur. N. S. 249. of 1876.

³ *Rup Narain v. Awad Persad*
Ibrahim Saib v. Muni Mir 7 All. 478. (1885).
Udin Saib, 6 Mad. H. C. R. 26,

LOCAL CUSTOMS.

The fixed rule of law as laid down by the Calcutta High Court is that, where the custom of the right of pre-emption under Mahomedan law has been adopted by Hindus in any particular district, it shall be there recognized as a legal custom.¹ The existence of the custom of pre-emption has been recognized in Gujarat,² Behar,³ Bhagalpore⁴ and perhaps in some places in Cachar.⁵

No local custom enforcing pre-emption prevails in Dacca,⁶ Rungpur,⁷ Tipperah,⁸ Sylhet,⁹ Jessore¹⁰ and Chittagong.¹¹ As regards the last mentioned district, there were many decisions of the lower court in favour of the existence of a local custom of pre-emption, but no decision of the High Court. The matter first came up before the High Court in a second or special appeal. The learned Judges, (Bayley and Macpherson JJ.,) who heard the appeal had before them three decisions of the lower court in favour of, and one against, the prevalence of the custom of pre-emption. Upon such conflicting decisions of the sub-

¹ *Inder Narain Chowdhry v. Mohamed Nazirooddeen*, 1 W. R. 235 (1864).

² *Gordhandas Girdharbhai v. Prankor*, 6 Bom. H. C. R. 263 (1869); *Narun Nursuee v. Premchand Wullubh*, 9 Harrington 591.

³ *Musst. Joy Koer v. Suroop Narain Thakaor*, W.R. 259 (1864); *Fukeer Rawut v. Sheikh Emambuksh*, B. L. R. Suppl. Vol. 35 (F.B.) (1863). *Parsasth Nath Tewari v. Dhania Ojha*, 9 C. W. N. 874 (1905).

⁴ *Fukeer Rawut v. Sheikh Emambuksh*, 8 Sevestre 141 (F.B.) (1863); s. c. B. L. R. Suppl. Vol. F. B. 35 (see the cases referred to and discussed in this case. They range from 1792 to 1862 and are both from Bengal and N. W. P.)

⁵ *Pooro Singh Monipooree v. Hurrychurn Surma*, 10 B. L. R. 117, at p. 120, (1872); s. c. 18 W. R. 440.

⁶ *Shiraj Ali Chowdhry v. Rumzan Bibee*, 8 W. R. 204 (1867); *Sheikh Kudratulla v. Mohini Mohan Shaha*, 4 B.L.R. 134 (F. B.) (1869).

⁷ 4 B. L. R. 134 (F.B.) (1869).

⁸ *Dewan Munwar Ali v. Syud Ashurooddeen Mahomed* 5 W. R. 270 (1866).

⁹ *Jameela Khatoon v. Pagul Ram*, 1 W. R. 250 (1864).

¹⁰ *Madhub Chunder Nath Biswas v. Tamee Bewah*, 5 W. R. 279 (1866).

¹¹ *Inder Narain Chowdhry v. Mohamed Naziruddeen*, 1 W. R. 234 (1864).

ordinate court, their Lordships held that the custom was not established.¹ The matter again came up before them in review.² On this occasion some more decisions of the lower court were put in. Bayley J., from "a preponderance of decisions," held that the Hindus in Chittagong had adopted the system of pre-emption prevalent amongst Mahomedans. Macpherson J. admitted that the decisions in favour of the custom were "in a proportion somewhat greater than 3 to 1." Nevertheless, as they were conflicting his Lordship thought, they could not prove the custom. As their Lordships differed, the application for review was rejected. But considering that the majority of the decisions of the lower court were in favour of the existence of the custom of pre-emption in the district of Chittagong, and that one of the learned Judges who heard the review was of the same opinion, we think the existence of the custom of pre-emption may be taken as established in this district.

Whether a custom of pre-emption prevailed as among Christians or Europeans was considered in two cases,—one from Bhagalpur and the other from Cachar. In the Bhagalpur case³ the vendor was a Hindu; the plaintiff claiming the right of pre-emption was a Hindu. The defendant-purchaser was a Christian. The locality of the transaction was Bhagalpur in the Province of Behar. In Behar, as we have already seen, the Mahomedan custom of pre-emption has been adopted by the Hindus and is therefore binding on them. The court thought that the question as to the custom of pre-emption prevailing amongst Christians in Bhagalpur had to be clearly proved on the same principle as that applied to Hindus in Behar. In this case the first court decided that Mr. Christian was a co-parcener in possession; but the

Pre-emption
among Chris-
tians or
Europeans.

¹ *Vide* 1 W. R. 234 (1864). (1866).

² *Nasirodddeen Khan v. Inder-* ³ *Maheshee Lal v. G. Christian*
narain Chowdhry, 5 W. R. 237 6 W. R. 250, (1866).

Lower Appellate Court's finding was silent on that point. "If Mr. Christian was a co-parcener," said their Lordships, "no right of pre-emption *as against a co-parcener* could exist. The right could, under Mahomedan law, only be against strangers or third parties, *not co-parceners*." In this view their Lordships remanded the case to be tried on the following issues, *viz.* :—

- (i) Whether Mr. Christian is or is not a co-parcener; if so, how can this suit for pre-emption affect *him*?
- (ii) Whether custom makes pre-emption binding on a Christian in Bhagalpur?
- (iii) Whether the vendor and pre-emptor being Hindus, their right of pre-emption was affected by Christian defendant being the purchaser?

Unfortunately we are not in a position to say what the findings on those issues were, as we do not find any further report of the proceedings.

In the Cachar case¹ a Hindu brought a suit against a Christian vendor and Monipoori purchasers to enforce his right of pre-emption and to obtain possession of certain lands situate in Cachar. The defence was, that although by local custom the law of pre-emption was applied to Hindus in some places, it had nothing to do with Europeans. Couch C. J. observed: "We think it is essential that the vendor should be subject to the rule of law. If it were not so, a Mahomedan might become a partner in an estate owned by Christians or Hindus, which they could not prevent, and then he might prevent their selling their shares to any other person."² The court accordingly held that as the vendor in this case was a European, there was no right of pre-emption.

Pre-emption being wholly a question of the law of

¹ *Poorno Singh Monipooree v. Hurryohurn Surmah* 10 B. L. R., 117 : s. c. 18 W. R. 440 (1872).

² *Ibid* 121.

sale and contract, the applicability of the Mahomedan system of pre-emption to non-Mahomedans depends on custom. Hindus or Christians, if they adopt the custom of pre-emption, will be bound by it, but the custom must be clearly proved.

"Bhabak Mahals" are tracts of land comprising a certain number of mouzahs of Doobrajpur and the neighbourhood, in the district of Beerbhum. In a claim for an eight annas' share the plaintiff said that "agreeably to the long established custom, the properties of *Vaisnabs* and *Vaisnabis* in the aforesaid mahals dying without heir have been divided among us according to our respective shares." The defendant claimed a similar right, not under a custom but under a grant from the Rajahs of Beerhum. The first Court gave the plaintiff a decree, not upon the ground that he had proved the alleged custom but upon the ground that he was the *guru* or spiritual preceptor of the deceased person. The Lower Appellate Court reversed the decree and found that the right belonged to the defendant. On second appeal, the High Court observed : "It was admitted by both parties at the outset of the case that there was such a custom in this district, and although, no doubt, the custom is of a peculiar character, yet it appears that it has been always recognized by the courts notwithstanding that it is in contravention of the ordinary Hindu law. If it had been necessary for us to consider the validity of this custom, we should probably have presumed that the custom had a legal origin. But it is sufficient in this case to say that upon the case made by both the parties, there is such a custom in this district and that the court below has found that the right belongs not to the plaintiff but to the defendant."¹

"Bhabak
Mahals."

¹ *Nil Madhub Gossamoe v. W. R. 397 (1874).*
Chunder Mookhee Gossamoe, 22

Vaisnabs
of Manickganj
in Dacca.

A very curious custom was set up in *Gourdas Byragee v. Anunnd Mohun Chuckerbutty*.¹ There the plaintiffs alleged that one Narotum Thakoor founded a sect of *Vaisnabs* in Bengal some generations ago, and that they belonged to his family. They claimed that on the performance of a certain form of marriage among the disciples of the founder (scattered throughout the provinces of Bengal, Behar and Orissa) they were entitled to some fees. They instituted an action to enforce this demand as, in this instance, one of the sect had paid the fee to his own *guru* or spiritual preceptor. The lower courts gave judgment for the plaintiffs, observing that the right to the claim had been established by former judgments of the Court. On second appeal, it was found by Barlow and Colvin JJ., (Dick J., dissenting) that the plaintiffs were unable to produce any judgment by which the refund of money received as a voluntary gift from a third party was decreed to them against an opponent on the ground of his being a disciple. As no judgment whatever was produced, the question whether former judgments established a custom or usage of legal force, in respect of such a refund, so as to preclude further investigation, was not gone into. Further, as the plaintiffs who sued on the ground of usage and custom failed to substantiate it, the judgments of the lower courts were reversed.

¹ 5 S. D. Decis. 428 (1849).

CHAPTER III.

CASTE CUSTOMS.

"Caste, in the days of the Vedas", says Sir Gooroodass Banerjee, "was an ethnological distinction. There were then two great castes, the *Aryas*, or the fair-complexioned new settlers, and the *Dasyus*, sometimes called the *Sudras*, or the dark-complexioned aborigines. *Varna*, literally colour, was then a strictly appropriate word for caste. Gradually as the *Aryas*, according to their occupations, divided themselves into three classes of priests, warriors, and traders or agriculturists, there arose the four-fold divisions into Brahmans, Kshatriyas, Vaisyas, and Sudras. By intermarriage among these castes, which was then allowable, there arose a number of mixed classes, which have been treated of in the tenth Chapter of Manu; and further, by a division of Sudras according to their occupations there arose a number of sub-castes, such as the *Karmakars* (Blacksmiths); the *Tantis* (Weavers); the *Kumaras* (Potters) &c."¹

Mr. Morley, in his "Digest of cases," under the heading of *Caste* appended the following note: "Originally there were but four castes viz., the Brahman, the Kshatriya, the Vaisya and the Sudra. The Kshatriya and the Vaisya and perhaps even the Sudras are alleged by the Brahmans to be extinct. At the present day these are replaced by a multitude of mixed castes who maintain their divisions with great strictness and abide by certain laws and regulations fixed by themselves. These mixed castes, in many cases, coincide with trades which, in all towns are held together as *Jamaat* or companies, under hereditary chiefs,

¹ See Banerjee's *Tagore Lectures on Hindu Law*. (2nd Edn.) p. 643 for 1878. (2^d Edn.) p. 68. See also *et seq.* Bhattacharya's *Commentaries on*

who, with a council, or *Punchayet*, settle all disputes among themselves, including those of caste; this, however, appears to apply to trades carried on in a common locality; and it does not follow that a goldsmith of one city would acknowledge common caste with a goldsmith of any other."¹ The term *Jamaat* is not synonymous with caste. It refers to the manufacturing communities or crafts. It is quite possible that all the members of a *Jamaat* might not be exactly of the same caste, though community of caste and community of occupation generally go together. The growth of caste and the origination of different occupations have necessarily caused the growth of a body of rules for the guidance and preservation of the community and these rules have at last crystallized into usages and customs.

**Expulsion
from caste.**

A caste custom binds all the members of a caste residing in a particular area. It varies with localities even among the members of the same caste. But on general matters caste customs agree even among different castes. For instance, the custom of expelling a member from caste for violating a caste rule or committing any offence is to be found among all castes. The *Guru* or the *Punchayet* or a majority of caste-men sit in judgment over a delinquent caste-man, and their verdict is absolute and imperative. The condemned person has no remedy even in Courts of Justice, unless the decision were shown to be not *bonâ fide*. In *Ganapati Bhatta v. Bharati Swami*,² the head or ecclesiastical chief issued a provisional order of excommunication against the plaintiff for having committed three caste offences; the plaintiff sued to have it declared that the order passed against him was unjust and invalid. The court held (approving *The Queen v. Sri Vidyasankara Narasinha Bharathi Guruswamulu*³ and *Murari v. Suba*)⁴ that the *Guru*

¹ See Morley's Digest Vol. I. p. 90. ² 6 Mad., 381. (1883).
³ 17 Mad., 222 (1893). ⁴ 6 Bom. 725. (1882).

had jurisdiction to deal with such matters according to recognized caste custom and considering the provisional nature of the orders and other circumstances he had exercised his jurisdiction *bona fide*, and hence the Civil Court could not interfere in the matter. In *Krishnasami Chetti v. Virasami Chetti*¹ it was held that it was open to the Court to determine whether or not the alleged expulsion from caste was valid, that if a person had not in fact violated the rules of the caste, but was expelled under the *bond fide* but mistaken belief that he had committed a caste offence, the expulsion was illegal. Kerton J. in the same case held that a custom or usage of a caste to expel a member² in his absence without notice given or opportunity of explanation offered was not a valid custom. His Lordship was of opinion that the maxim of *audi alterem partem* could not be superseded by even an immemorial custom.³

With regard to notice and opportunity of vindication not being given to a person before he or she was declared an outcaste, we quote the following from the remarks of the learned Judges in *Vallabha v. Madusudanan*⁴ :—“ It was certainly a serious defect in the investigation that the respondent was not heard before he was condemned upon the uncorroborated testimony of the woman....No inquiry can be treated as fair when a person deprived of his *status* in his caste is not heard before he is condemned.” Of course when due notice of inquiry was given and the person concerned refused to attend such inquiry, he could not afterwards complain that no inquiry was held.⁴

As sometimes the violation of caste custom brings the offender within the purview of offences defined by the Indian Penal Code, it is necessary for us to see how far the Criminal Courts have jurisdiction to inquire into such

Without notice.

Caste question and jurisdiction of criminal courts.

¹ 10 Mad. 133 (1886).

⁴ See *Gunapati Bhutta v.*

² Vide *William v. Lord Bagot, Bharati Swami*, 17 Mad., 222
3 B and C 772 at 786 (1825). (1893).

³ 12 Mad., 495 (1889).

matters and how far the plea of custom will prevail. In *The Queen v. Sri Vidya Sankara Narasimha Bharathi Guruswamulu*¹ the complainant was one of the persons pronounced out of caste by their *Guru* or spiritual superior for having taken part in the celebration of certain widow re-marriages. It would seem that the *Guru* in response to a petition of the orthodox section sent two documents, one to the signatories of the petition and the other, a post-card, to the complainant, interdicting those who had taken part, or attended the celebration of these marriages and excommunicated some permanently and others provisionally, i.e. until they submitted to some penance. The post-card which was directly addressed to the complainant contained the same interdict. After the publication of this interdict the complainant was put to serious inconvenience. The complainant was prevented from performing vows in the temple, lost the society of his relatives and was otherwise injured. Thereafter he charged his *Guru* under ss. 499 and 500, 503 and 506 and 508, I.P.C., (i.e. Criminal intimidation, intimidation by attempt to induce a belief that by an act of the offender the person intimidated would become an object of divine displeasure, and defamation). The Joint Magistrate acquitted the accused of all the charges. The High Court, however, on appeal held that the first two charges were unfounded but convicted the defendant of defamation for having communicated the sentence of excommunication by a post-card.

Now, one principal point established in this case was the jurisdiction of a Criminal Court to interfere with the custom of the people. It was fortunate that of the two learned Judges who heard this Criminal appeal one was an Indian Judge, no less a personage than Sir Muttusami Ayyar, and the other was Sir Charles A. Turner, Kt., the Chief Justice of Madras. Both were of opinion that "a Criminal Court has no doubt jurisdiction to enquire into

any case of conventional discipline or spiritual oppression which exceeds its legitimate bounds and comes within the purview of any of the offences defined by the Penal Code." "But," said Sir Muttusami Ayyar, "if it is consistent with the usage of the caste and if it is not expressly forbidden by law, we are not at liberty to treat it as a criminal offence."¹ Pronouncing a man out of caste is a conventional mode of vindicating caste usages. Where a *Guru* exercises his right to excommunicate a disciple in good faith and honesty, he cannot be touched by the Criminal Law. The Court, therefore, exonerated him of all charges of intimidation by excommunication, but found him guilty of defamation for sending such intimidation by a post-card which might be read by others and consequently was illegal.

"This mode of communicating a sentence of excommunication," said Sir Muttusami Ayyar, "is quite new and not sanctioned by custom, and the duty arising from the relation of spiritual superior and disciple does not protect libellous communications to persons who are not disciples and for the protection of whose spiritual interests the power of excommunication is not allowed by the custom of the caste."² As between a *Guru* and his disciples, though the language of the post-card was not inconsistent with what the *Guru* might have believed to be his duty as their spiritual superior, and though the defendant did not exceed his privilege in addressing the post-card to the complainant over whose conduct he had authority as spiritual superior, their Lordships were of opinion that "the mode of publication adopted by the defendant violated the privilege and indicated a conscious disregard of the complainant's legal right."

In *Reg v. Sambhu Raghu*³ it was laid down that courts of law would not recognize the authority of a caste

¹ 6 Mad. p. 388.

² 1 Bom. 347 (1876).

³ Ibid p. 391.

to declare a marriage void, or to give permission to a woman to re marry. A married woman of the *Teli* caste, married again during the life-time of her first husband, who was a leper, with the consent of her caste-people. When she was prosecuted for bigamy she pleaded caste custom which was, however, not established. The High Court in upholding her conviction said the *bonâ fide* belief that the consent of the caste made the second marriage valid might be taken into account as a circumstance in mitigation of punishment but certainly did not constitute a defence to a charge of bigamy.

Jurisdiction
of Civil
Courts.

Civil Courts have no jurisdiction to deal with caste questions, as the taking cognizance of such matters would be an interference with the autonomy of the caste. Regulation II of 1827, sec. 21, has excluded caste questions from the cognizance of the civil courts. The principle was clearly laid down by the Bombay High Court in a special appeal, No. 39 of 1862. There the question was as to the right of the plaintiff to be recognized as the head of the caste and to be entitled to receive from other members of the caste certain privileges and precedence. The Court held that the question at issue was a caste question and to hold otherwise would be to interfere with the autonomy of the caste. The right to an office of dignity in a caste is a caste question and, as such, no suit will lie against the members of the caste who refuse plaintiff the privileges belonging to that dignity.

This principle was followed in several cases. For instance, in *Murar Daya v. Nagria Ganeshia*.¹ Here the plaintiffs sued to recover from another member of the caste fees alleged to be due to them as *Mehtars* or chief men of the caste on the marriage of the defendant's daughter. In *Shankara v. Hanma*² the plaintiff claimed

¹ 6 Bom. H. C. R. A. C. J. 17 ² 2 Bom. 470 (1877).
(1869).

to be the hereditary holder of the office of *Chalvadi* in the Lingayet caste of Bagalkot to which (it was found by the lower court) no fees as of right were appurtenant, and he sued the defendants for damages for having dispossessed him of the office. In *Murari v. Suba*¹ the plaintiff belonging to the Mohar caste sought to establish his right as *Guru* to certain annual fees from his *sishyas* (disciples), and to recover one year's arrears of such fees from them. In this case all the previous cases were referred to and Sargent C. J., at p. 727 said—"Upon these authorities it must be taken as well established that a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honours at the hands of the members of the caste in virtue of such office is a caste question and not cognizable by a Civil Court; and, indeed, we think the same rule ought to apply when there are fees appurtenant to the office." His Lordship approved of the principle laid down in Appeal No. 39 of 1862 and said "applying that principle, we think, it would be equally so, whether the question turns upon the obligation of the members of the caste to accord to the holder of the office certain privileges and honours or to pay him fees in virtue of his office. In either case it is one which, if a caste is to be considered in any sense a self-governing body as is contemplated by the Regulation of 1827, should, we think, be left to be decided and dealt with by the caste according to its customary mode of procedure." In *Abdul Kadir v. Dharma*,² which involved a caste question, the High Court held that the suit was not maintainable in a Civil Court.

The Madras High Court following *Murari v. Suba*³ has held that in a matter relating to caste customs over which the ecclesiastical chief has jurisdiction and exercises his jurisdiction with due care and in conformity with the

¹ 6 Bom. 725 (1882).

² 6 Bom. 725 (1882).

³ 20 Bom. 190 (1895).

usage of the caste the Civil Courts cannot interfere. A *Guru*, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of the caste according to recognized caste customs.¹ Where the caste heads exercise their jurisdiction not *bona fide* or exceed their legitimate powers, an aggrieved person will have his remedy in a Civil Court. Thus in a suit for damages for defamation by a person against those who had declared him an out-caste, the Court, having found that the defendants had not acted *bona fide*, held the plaintiff entitled to damages.²

According to the usage obtaining among the Numbudri Brahmans on the West Coast, a caste inquiry is held whenever a Numbudri woman is suspected of adultery and if she is found guilty, she and her paramour are put out of caste. The inquiry is made in this way. When a woman is suspected, her kinsmen and their family priest examine her maid servant and ascertain if there is ground for fuller inquiry. This preliminary investigation is termed *dasi vicharam*. On its being ascertained that further inquiry is necessary, a report is made by them to that effect to the Rajah, recognized as the protector of the caste usage, and the woman is meanwhile asked to reside in a detached part of the house called "anjampura." On the Rajah approving of the report, he appoints a Smarthan (a Brahman acquainted with Smriti), four Mimansakars (men versed in sifting evidence) and two others called *Akomkoima* and *Puramkoima* to aid in the investigation. The investigation is conducted at the time and place appointed and, if the woman is found guilty, she and her paramour are pronounced to be outcastes.³

In *Venkatachalampati v. Subbarayadu*⁴ where a *Smarta* Brahman, who was prevented from entering the inner shrine of a temple to present an offering, for his having

¹ *Ganapati Bhatta v. Bharati Mad.* 495 (1889).
Swami, 17 Mad. 222 (1893).

² See *Ibid* p. 497.

³ *Vallabha v. Madusudanan*, 12

⁴ 13 Mad. 293 (1889).

married a widow contrary to the Hindu *Shastras*, sued for damages for the above obstruction, the Court held that the right claimed was of a civil nature and within the cognizance of the Court and the question to be determined was not the question of the Plaintiff's legal *status*, since a Brahman widow was at liberty to re-marry under Act XV of 1856, but it was a question of caste *status* in respect of a caste institution. And in order to determine that question the Court ordered inquiry into the usages of the temple regarding admission into the inner shrine and whether according to such usage those who seceded from the caste custom as to remarriage of women were debarred from admission.

The Allahabad High Court, in *Bisheshur v. Mata Gholam*,¹ has held that while the Courts have generally accepted the decisions of properly constituted *Punchnayets* on questions of caste, they have accepted them subject to the qualification that the decision of the *Punchnayet* does not stop the Courts from enquiring into the civil rights of any member of the caste and securing to him the enjoyment of such rights, if he be found not to be precluded from the enjoyment of them by the *Shastras* or the particular usages of his caste.

Since Act XXI of 1850 has come into operation mere loss of caste does not operate as a disqualification to a person's civil rights. Whatever might have been the effect of such excommunication prior to the passing of the Act, there is now no forfeiture of rights by loss of caste. The Act has abrogated so much of any law or usage which inflicted on any person forfeiture of rights or property, or which might be held in any way to impair or affect any right of inheritance by reason of his or her having been excluded from the communion of any religion or being deprived of caste. Thus, therefore, in *Karuthedatta v. M.*

Loss of caste
and forfeiture
of civil rights.

¹ 2 N. W. P. 300 (1870).

P. V. D. Namboodri,¹ it has been laid down that exclusion from caste of a Hindu for an alleged intrigue does not involve deprivation of his civil rights to hold, deal with and inherit property. Again, where a Hindu has been deprived of caste by the members of his brotherhood on account of his intending to give his infant daughter in marriage to a man both old and impotent in consideration of receiving from him some money, he does not, thereby, under Hindu law forfeit his right as guardian of such daughter. Even if the Hindu law, in such cases inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced. A suit by the nephew for the possession of the minor and for the declaration of his right to give the girl in marriage as her guardian in lieu of the out-caste father, cannot be maintained.² Similarly, where a Hindu widow is entitled to a bare or starving maintenance under a decree made in a suit, she cannot be deprived of the benefit of that decree by the fact that she has since its date been leading an incontinent life.³

A widow of the Aheer caste, in the district of Moradabad, by her second marriage, does not forfeit her rights to act as guardian to her son by her first marriage. Apart from the well known custom among the Aheer caste according to which the re-marriage of a widow in no way affects her respectability, *status* or rights, Act XIV of 1856, sec. 3 saves the rights and status of widows on their

Where suits
will not lie.

Questions involving solely the rights of the castes, and, not involving any civil rights, will not form the subject-matter of any suit and no Civil Court will entertain such

¹ 1 Ind. Jur. N. S. 236 (1866).

Bom. 559 (1877). See also

² *Kanahi Ram v. Biddya Ram*, 1 All. 549 (1878).

Rajah Pirthee Singh v. Rani Raj Kower, 20 W. R. 21 (P. C.) (1873) distinguished.

³ *Parvati v. Bhiku*, 4 Bom. H.

C. B. A. C. J. 25 (1867); followed

in *Honamma v. Timannabhat*, 1

Kishun v. Erayut Hossein,

4 N. W. P. Decis. 486 (1861).

a suit. In *Namboory Setapaty v. Kanoo-Colanoo Pullia*¹ the dispute was in respect of the respective rights of the Brahmans and the Vaisyas. The Comaties are a tribe of merchants and traders residing at Masulipatam in the Presidency of Madras. The representatives of the tribe brought a suit to establish their right to have performed for them and their tribe certain religious ceremonies, called *Soobha* and *Asoobha*, (auspicious and inauspicious) by Brahmans in the language of the Vedas, in the enjoyment of which they had been disturbed by the Brahmans refusing to perform such ceremonies. The defendants (who were members of the *Mantri-maha-nad* or secret assembly for avenging encroachments on the rights and rules of caste) asserted that the Comaties and the whole merchant class, having for many ages neglected to observe some of the ceremonies prescribed for their caste, and, in their stead, adopted other and spurious ceremonies in conformity with rites prescribed in the *Puranas* and other works, had become degenerate, and had so absolutely forfeited the privilege they once possessed, that no expiation could restore them to their former rights.

Disputes having for a long time existed between the Brahmans and the Comaties, concerning the performance of these ceremonies, and disturbances having constantly taken place on their performance or on the attempt to perform them, the Magistrate of the city of Masulipatam, in order to bring the question at issue before a tribunal competent to determine the right, issued an order prohibiting the Comaties from the performance of one of the ceremonies in question in the language of, or according to, the Vedas, until they had established their right to do so in a Civil Court. In consequence of this order the present suit was instituted. The Zilla Court, taking that part of the defendant's answer which set forth the acts by which the forfeiture of the rights in question was

¹ 3 Moo. I. A. 359 (1845).

occasioned, framed it into a statement for the opinion of the *Pundit* of the Court ; and upon his opinion declared the plaintiff's tribe entitled to have the ceremonies performed for them by Brahmins. Upon appeal, the Provincial Court remitted the suit to the Zilla Court to take evidence, and upon such evidence and the opinions of the *Pundit*, which the Provincial Court took upon the same statement as the Zilla, they affirmed the decree. The Sudder Dewany Adawlut, upon the whole case, reversed these decisions. The Judicial Committee of the Privy Council, reversing the decisions of the three Courts, held that the whole proceedings were irregular and contrary to the express provisions of the Madras Regulations XV of 1816, s. X. cl. 3 and 4 which required the Judge to record the points necessary to be established, before the evidence could be taken ; the opinions of the *Pundit* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit. This case, however, left open the question, *viz.*, whether the civil courts in India have any jurisdiction to entertain a suit not involving any civil rights. The decision of the Judicial Committee proceeded on quite a different line and the main question still remained undetermined. But the decisions in the following cases have cleared the point and set the question at rest.

There are several reported cases¹ in which the point was whether a barber could be compelled to render his services to the persons whom he refused to shave. The parties aggrieved sued for damages on account of loss of honour and asked for an order of the Court to compel the recalcitrant barber to do his prescribed work. In all these cases it was held that the Court had no jurisdiction to entertain such suits as no suit would lie. In *Pitamber Rotansi v. Jagjivan*

¹ *Phaguna Noyee v. Menye-matha*, (from Rungpur, decided, 22 Novem. 1854), 8 Sevestre, 11 (Footnote) (1865); *Rajkristo Majee*

Honsraj,¹ the suit was by a former Satia, (the spokesman or leader), of the Lovana caste, to recover from a person belonging to the same caste a certain sum agreed to be paid by the latter on his re-admission to the caste. The High Court held that the suit was not maintainable, as the agreement was made with the Satia in his representative, and not in his personal, capacity and the benefit of the agreement accrued not to him but to the caste. Further, as his successor, the present Satia, and other leaders of the caste disapproved of the suit, it could not be maintained.

Many caste customs relate to Marriage and Divorce, and a reference should be made to the chapter dealing with them. Here we will mention a few in passing, e.g., re-marriage of widows. It is well known that the re-marriage of widows is prevalent among many castes of the lower orders in different parts of India. And since such re-marriages are sanctioned by caste custom, they are also regarded as valid marriages by the Courts. The position and *status* of the re-married widows are in no way different to those of spinisters on marriage. Their offspring do not labour under any disqualification in matters of inheritance and succession. For instance, the *Aheer* caste in the district of Moradabad,² the *Raoetas*,³ the *Koirees* and other castes of Behar,⁴ the *Hulwae* caste of Benares,⁵ the *Namasoodras* of Midnapur,⁶ the Jats of Ajmere.⁷ Among the *Koirees* such re-married widows are:

Re-marriage
of widows
sanctioned by
caste custom.

v. *Nobacc Seal* (From Tipperah, decided, 22 Decem. 1864). 8 Sevestre 10 and 11 (Footnote); *Keenker Hajam v. Sheikh Sudde*, 8 Sevestre 9 (1865).

¹ 13 Bom. 131 (1884).

² *Kishun v. Enayat*, 4 N.W.P. Decis, 486 (1861).

³ *Rudaik Ghasorin v. Budaik Pershad Sing*, 1 Marshal 644 (1863).

⁴ *Bissuram Koiree*, 3 C.L.R. 410 (1878).

⁵ *Kally Charan Shaw v. Dukhee Bibee*, 5 Cal. 692 (1879): s. c. 5 C.L.R. 505 : s. c., 3 Shome 81.

⁶ *Hurry Charan Dass v. Nimai Chand Koyal*, 10 Cal. 138 (1883). s.c. 13 C.L.R. 207.

⁷ *Mudda v. Sheo Baksh*, 3 All. 485 (1881).

so far the legal wives of their husbands as to justify the punishment of persons committing adultery with them.¹

Among the
Maraver caste

The Maravers, strictly speaking, are not Hindus, but in their customs and observances they are mainly governed by the Hindu law. Among them widows may re-marry and in this respect their customs differ from the Hindu law. In *Murugayi v. Viramakali*² the question was whether a widow of the Maraver caste, on her re-marriage, lost her claim to the property of her first husband. The Court applying the principle of Hindu law held that she did lose her claim to her first husband's property. The Court observed: "The principle on which a widow takes the life-interest of her deceased husband when there is no male heir is that she is a surviving portion of her husband; (See *Smriti Chandrika* Ch. XI. s. 1 §. 4) : and where the rule as to re-marriage is relaxed and a second marriage permitted, it cannot be supposed that the law which these castes follow would permit of the re-married widow retaining the property in the absence of all basis for the continuance of the fiction upon which the right to enjoyment is founded. From Steele's Hindu Castes, it appears that it is the practice of a wife or widow among the Sudra castes of the Deccan, on re-marriage to give up all property to her former husband's relations, except what had been given her by her own parents; and we have little doubt that the law in this Presidency will not permit the widow who has re-married, and who must be regarded as no longer surviving her husband, to lay claim to the property left by him, and now in the possession of the daughter who, in default of the widow, is the right heir."

Wife's right
to re-marry
among the
Aheers.

In *Musst. Dureeba v. Juggernath*³ the husband claimed the restoration of his first wife, who pleaded that according to the custom of the Aheer caste whenever a husband married

¹ *Bissuram Koiree*, 3 C. L. R. 410 (1878).

² 6 N.W.P. Decis. Part I, p. 128 (1855).

³ 1 Mad. 226 (1877).

a second wife, the first wife was at liberty to take a second husband, and as in this case her first husband *had* taken a second wife, he was not entitled to a decree. On reference to the Hindu law officer no authority was to be found in the *Shastras* to support this contention, and the Court declined to recognize it. It is not clear whether any evidence was adduced in support of this alleged custom. But we venture to think that even if satisfactory evidence to prove it was forthcoming, the Court would have refused to give effect to the custom as being immoral.

The Sect of Lingayets is largely represented in Mysore, and, to a certain extent, in the Wynnaad; and also in the ceded Districts in Coimbatore, and South Canara in the Madras Presidency, and in Dharwar, Kolhapore and other places in the Bombay Presidency. They owe their origin to one Basava, who reformed the Lingayet religion, and repudiated Brahmanical observances. He introduced amongst his followers the practice of wearing the *ling*, and held that, as all *ling*-wearers are equal, there should be no caste distinction among them. A Lingayet woman stands in the same footing as a Lingayet man. She does not marry till she comes of age and has a voice in choosing her husband. The customs of the Lingayets vary in different districts. As for instance, at Kolhapore neither eating together nor intermarriage is allowed among different classes of Lingayets. A *Jangam*, i. e. a Lingayet priest, may in Dharwar marry the daughter of a pure Lingayet, a Shilvant, or a Banjig.¹ The status of Lingayets as Sudras was determined by the judgment in the case of *Gopal Narhar Safray v. Hanmant Ganesh Safray*.² Mr. Justice Ranade in *Basava v. Lingangauda*³ says:—"The Lingayets are admittedly a heretical sect, and are not subject to Brahmin religious laws." The liberty of widow re-marriage

Among the
Lingayets.

¹ *Vide Steele's Hindu Castes*; 22 Bom. 227 at 280 (1896).

Campbell's Gazetteer, the Dharwar District; ² 3 Bom. 273 (1879).

Fukirgauda v. Gangi; ³ 19 Bom. 428 at p. 457 (1894).

and even of wife re-marriage has been allowed to the Lingayet community.¹

Cumbala
Tottier caste :
Female suc-
cession.

Among the Cumbala Tottier caste, females are not precluded by any rule of descent, custom or usage from succeeding to a Polliam. The Collector of Madura instituted a suit for possession of the Polliam of Erasaca Naiknoor in Madras as an escheat for want of male heirs. Evidence as to the custom and usage of females to succeed to the Polliam in question was adduced. Prior to the institution of the suit, the Polliam was in the possession of a female for eighteen years after the alleged escheat for want of male heirs. The Government acquiesced in the right of female succession to the Polliam. Consequently the suit was dismissed.²

Potter caste
in Tinnevelly:
custom of di-
vorce.

Among the members of the potter caste in Tinnevelly there is a caste custom according to which a married woman by repaying the expense of her marriage (which is called *parisam*) to her husband can get the marriage dissolved, and is at liberty to re-marry another person. In *Sankaralingam Chetti v. Subban Chetti*,³ the Court held that divorce in this form is consistent with the original customs of the potters and the custom is sufficiently ancient. "We do not think," said the learned judges, "that it is immoral, since it does not ignore marriage as a legal institution but provides a special mode by which it may be dissolved. The fact that there is a money-payment does not make the custom immoral and among the inferior castes similar customs are known to prevail."

Bogam caste :
Succession to
property left
by mother.

By the custom of the Bogam or dancing girl caste residing in the Godavari district, property left by the mother is divided equally between sons and daughters. In

¹ *Vide Chapter on Marriage and Divorce. Infra.* *Veeracamoo Ummal, 9 Moo. I. A.* 446 (1863).

² *The Collector of Madura v. I. 17 Mad. 479 (1894).*

*Chandrareka v. Secretary of State for India*¹ the plaintiff claimed a moiety of the property valued at a large sum, in the possession of his sister, as being "ancestral property and property jointly acquired" in which he and his sister had equal rights according to the custom of their caste. The sister denied plaintiff's claim and pleaded that she had acquired all the property as a prostitute. The District Judge passed a decree for plaintiff for a small sum as "representing the moiety of the property left by his mother." The High Court held that on the evidence the custom set up was established.

Reddi caste :
whether
a father-in-
law can dis-
inherit his
heir in
favour of
his son-in-
law.

In *Tayumana Reddi v. Perumal Reddi*² a custom was set up to the effect that among persons of the Reddi Caste a father-in-law could disinherit his heir in favour of his son-in-law. One R. had only a daughter and no male issue. He, having given her in marriage, executed a deed conveying all his property to his son-in-law absolutely. The High Court said that such custom had not the force of law as had been expressly declared by the Special Appeal No. 89 of 1859 of the late Sudder Court at p. 250 of the published decrees of that year.

Sudra Yati.
inheritance.

As a Sudra cannot enter the order of *Yati* or *Sannyasi*, the devolution of property left by a Sudra who has become an ascetic and renounced the world, is regulated by the ordinary law of inheritance in the absence of any general or special usage to the contrary.³

Queer custom
of legitimacy
among certain
caste or
family.

In *Chinnammal v. Varadarajulu*⁴ a very peculiar custom was set up to the effect that, according to the custom of the caste or family, children born of parents not married at the time of the children's birth are treated as their legitimate children by reason of the parents having performed the

¹ 14 Mad., 163 (1890).

nadhi v. Viropandiyam Pillai, 22

² 1 Mad. H.C.R. 51 (1862).

Mad. 302 (1898).

³ *Dharmapuram Pandara San-*

⁴ 15 Mad. 307 at 310 (1891).

ceremony of *pariyam* before their birth. The District Judge found the custom proved but the High Court said it was not, and made the following remarks: "It is not at all clear, however, what is the custom alleged or which the Judge considers proved, whether it is that the *pariyam* or betrothal ceremony is equivalent to marriage, and children born after that ceremony are legitimate, independently of any subsequent marriage, or whether a subsequent marriage is necessary to legitimize children so born. Nor is it clear whether the custom found by the Judge is a custom of the defendant's caste or only of his particular family, and, if the former, what his caste is. The Judge calls it Paligar or Yanadi. Neither of these terms is generally known as descriptive of a caste." Then commenting upon the evidence adduced in this case their Lordships continued: "This is in our opinion wholly insufficient evidence on which to find a peculiar custom of marriage or legitimacy prevailing in the defendant's caste or family. No judicial decisions recognizing the custom are proved. The only instances in which the custom is alleged to have been followed are in the defendant's own family. The custom is one contrary to the general law of marriage and inheritance prevailing amongst Hindus and requires strong evidence to support it. We notice also that the defendant's mother is said to have been of a different caste. That very loose notions of morality and of the sacredness of the marriage tie prevailed in the family to which the parties belong, is probable enough, for Thanappa Naicker appears to have kept the defendant's mother and another woman in his house from the time they were girls, and had children by them and subsequently to have married them, having in the meantime, married three other women. But something more than a prevailing low tone of morality in a family is required to establish a binding custom of legitimacy differing from the ordinary law. It appears, however, from the evidence that sons born under circumstances somewhat

similar to those of the defendant's birth, have inherited property in the defendant's caste or family, and we think some further inquiry as to the existence of any peculiar custom in the caste or family ought to be made." On the case being remanded the Judge returned the finding that the defendant's mother was not legally married at the time of his birth and that the family was a Sudra family. The High Court accepting this finding held that the defendant was the illegitimate son of a Sudra.

The Hindu law independently of special usage or custom does not make illegitimacy an absolute disqualification for caste so as to affect in the relations of life not only the bastard but also the legitimate children. The Hindu law, unlike the English Law, recognizes a bastard's relations to his father and family. By birth and without any form of legitimization, bastards of the three twice born classes are now recognized as members of their father's family and have a right to maintenance. So, in the case of Sudras.¹

In *Myna Boyee v. Ootaram*² it was held that the illegitimate children of an Englishman by a Hindu woman of the Ganda Brahman caste, who were brought up as Hindus and lived together as a joint family, were to be regarded as Sudras or as a class still lower, but Hindus, and their rights to be determined by the rights of the class of Hindus to which they belonged.

¹ *Pandaiya Telarer v. Puli Roshan Singh v. Balwant Singh*, 4 *Telarer*, 1 Mad. H.C.R. 478 (1863); 4 C.W.N. 353 (P.C.) [1899] : s. c. 22
M. J. Y. Naiker v. V. Fettia, 2 All. 191.
Mad. H.C.R. 293 (1865) ; Murdun Singh v. Purhulad Singh, 7 Moo. I. A. 18 (1857) ; *V. Udayan v. Singaravelu*, 1 Mad. 306 (1877) ; ² 8 Moo. I. A. 400 (1861) : s. c. (after leave reserved by the decree of Her Majesty in Council,) 2 Mad., *Rahil v. Govinda*, 1 Bom. 97 (1875) ; H. C. R. 196 (1864.)

CHAPTER IV.

HINDU CUSTOMS.

ADOPTION.

“Dattaka Mimansa” and “Dattaka Chandrika” are the two Hindu text books on Adoption. Both the works, as Sir William Macnaghten has said, “are equally respected all over India ; and where they differ, the doctrine of the latter is adhered to in Bengal and by the Southern jurists ; while the former is held to be the infallible guide in the Province of Mithila and Benares.”¹ In the well-known Ramnad case² the Judicial Committee expressed a similar view in respect of these two treatises. Mr. Mayne expresses a doubt as to whether they are regarded as authorities in the Bombay Presidency and in Southern India.³ We are not concerned, however, with what authorities are respected in any particular province. We find from these and other Hindu text-writers that in early ages no less than about twelve sorts of sons, besides the legitimate or *aurasa* son, were recognized by them.

The origin of these subsidiary sons is rather interesting from a juridical point of view. For the practice of having a subsidiary son where legitimate issue had failed was common to the Aryans as well as to the non-Aryans.⁴ And we venture to say that the same circumstances, the same

¹ Macnaghten's Hindu Law, Preface xxiii and p. 74.

Collector of Madura v. Mootoo Ramalinga Sathupathy, 12 Moo. I. A. 397 (1868); s.c.: 1 B.L.R. 1 (P.C.); s.c. 10 W. R. 17 (P. C.), and s.c. in the High Court 2 Mad. H.C.R. 206. See *Bhugwan Singh v. Bhugwan Singh*, 26 I.A. 153 (1899); s.c. 21 All. 412 (P.C.); s.c. 3 C.W.N. 454.

² Mayne's Hindu Law and Usage pp. 28 and 149. (1892).

³ “There can, I think, be no doubt that if the Aryans brought the habit of adoption, they also found it there already ; and the non-Aryan races, at all events, derive it from their own immemorial usage and not from Brahmanical invention.”—Mayne's H. L. 9 (1892).

necessity, the same environments operated on the minds of the people, whether they happened to be in ancient India or in ancient Europe, in evolving the practice of having a sort of substitute son. In early ages a sonless father would naturally be anxious to procure a substitute for a son to support him in his old age, assist him in his sickness and maintain his property in his own family. Thus it would seem that this practice or custom of taking into the family a stranger to fulfil the duties of a natural son had its origin in secular rather than religious necessity. The spiritual theory of adopting a son by one who has none "for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name"¹ was too complicated for the early stage of humanity. In fact its secular origin was not only consonant with the early communal life of the primitive village communities, but is also clear from other facts, such as the absence of any religious ceremonies in connection with adoption amongst various peoples in different parts of India, notably Jats and Sikhs, (both Hindu and Mahomedan) in the Punjab ; Jains in the North-Western Provinces ; Tamils in Southern India ; some castes in Western India, where their principal object in adopting is to find or appoint an heir. The desire for perpetuating or the celebrity of one's name does not certainly indicate a religious motive. Giving and taking are the operative parts of the whole ceremony of adoption and absolutely necessary.² Even among the three superior classes *dattam homam* is not regarded as an essential ceremonial. It is notorious that among Sudras no religious ceremony is at all necessary to validate an adoption ; mere giving and taking are sufficient for its purpose.

Of the various forms of subsidiary sons (as enumerated by Manu³) most are now obsolete. Practically only one

¹ See Dattaka Chandrika i. § 9 ; 7 I. A. 250 p. 256. (1880).

³ Dig. 297.

² Institutes of Manu, Chap. IX.

⁴ Mahashaya Skorinath Ghose, §§ 159 and 160.

⁵ Srimati Krishna Sundari Dasi,

form *viz.* *Dattaka* is in force now. *Kritima* form is confined to Mithila and to the Nambudri Brahmins of Malabar only. There is another form prevalent in some parts of India known as *dwyamushyayana*. Of these three species of adoption we will consider the last first.

Dwyamu-shyayana.

The term *Dwyamushyayana* is a compound word, and its root-meaning is 'son of two persons.' Originally the *dwyamushyayana* was restricted to one description of adoptive son, *viz.*, the *Kshetraja* *i.e.*, the offspring of a wife by a kinsman or person appointed to procreate issue to the husband or the son of the wife. But the term is diverted from its original meaning and now signifies any adopted son retaining his filial relation to his natural father with his acquired relation to his adoptive parent.²

Like the Roman *adoptio minus plena*, a *dwyamushyayana* remains in the family of his natural father but gains a right of succession to his adoptive father.³ This double relationship may be the result of express agreement at the time of adoption between the adopter and the person willing to give his son for the purpose; or it may be established without any special contract as when a sonless brother adopts the only son of another brother.

Sir William Macnaghten, in his work,⁴ describes *dwyamushyayana* as a peculiar species of adoption where the adopted son still continues a member of his own family and partakes of the estate both of his natural and adopting father and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply.⁵ It may take place either by special agreement that the boy shall continue son of both fathers,

¹ 'De' (two) + 'Amushya' (of a person) + 'ayana' (an affix signifying son).

² Strange's H.L. Vol. I, pp. 86, 100, 101.

³ Colebrooke's Hindu Law 296;

⁴ Macnaghten's H. L. Vol. I, 71.

Strange's Hindu Law Vol. I, 100 & Vol. II, 118.

⁵ See *Raja Haimun Chull Sing v. Kumar Ghunshiam Sing*, 2 Knapp 203 (P.C.) [1834].

when the son adopted is termed *Nitya Dwyamushyayana*, or, otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushyayana*; and in the latter case the connection between the adopting and the adopted parties endures only during the life-time of the adopted. His children revert to their natural family.¹

As to the distinction of *nitya* or absolute, and *anitya* or temporary *Dwyamushyayana* Sir Thomas Strange says thus: "According as this double filial connection is consequential, or the result of agreement, the adopted is *nitya* or *anitya*, a complete or incomplete *Dwyamushyayana*, though by some, this distinction is made to depend upon the adoption taking place before or after the performance of tonsure, in the family of the adopted; the effect in the latter case, where the adopted is from a different tribe (*gotra*) being, that the adoption, so far from being permanent from generation to generation, continues during the life-time of the adopted only; his son, if he has one, returning to the natural family of the father."²

Mr. Ellis of Madras made the following remarks on the opinion of the Pundit in *Hannununto Bhutloo v. Bhyrapah* (June 9, 1808), where the question was whether *Upanayana* of the son of an adopted son should be in his adoptive or in his natural *gotra*:—" *Nitya datta* is a son adopted from the same *gotra*, before or after the ceremony of tonsure; or a son adopted from a different *gotra*, before the tonsure; *Anitya datta* is a son adopted from a different *gotra*, after he has received the tonsure in his natural *gotra*. The performance of the tonsure is the cause of the temporary nature of the latter species of adoption."³

Mr. Colebrooke says: "I am not aware of any authority for holding that the issue of an *Anitya datta* may be

¹ See *Raja Shumshere Mull* 1 Fulton 75 (1837).

^v *Rani Dilraj Konwar*, 2 * Strange's H. L. Vol. I. p. 100.
S. D. Sel. Rep. 169 (216) [1816]; * Strange's H. L. Vol. II. p. 123.
Jyvymony Dassee v. Bibosondry.

initiated in either family. An adoption which renders the party son of two fathers (*dwyamushyayana*) is not unknown to the law. (See *Mitakshara* on Inh. ch. i sec. x). But, in such case the issue remains in the same *gotra*, in which the son of two fathers received his *Upanayana* or initiation.¹

The Allahabad High Court, upon consideration of the above authorities has, in a very recent case, held that an adoption in the *Nitya* or absolute *dwyamushyayana* form depends upon, and has its efficacy in, the stipulation entered into at the time of adoption between the natural father and the adoptive father, and does not depend upon the performance of any initiatory ceremony by the natural father.²

Notwithstanding the opinion of the Pundits,³ the *dwyamushyayana* form of adoption is customary in the present age. The *Anitya* form of it may be said to be obsolete now; but the *Nitya* form in the shape of an adoption by one brother of the son of another brother is still prevalent. What is very strange is that though the Hindu text-writers are very much against the principle of giving in adoption the only or eldest son, an exception is made in the case of a sonless brother adopting the only son of a whole brother. Mr. Sutherland lays down that an only son of a whole brother, if no other nephew exists for selection, must be adopted by his uncle requiring male issue, and is the son of two fathers.⁴ The Privy Council in *Nilmadhab Doss v. Bishumber Doss*⁵ recognized the principle of adoption of the eldest or only son of a brother by another brother as a *dwyamushyayana*,

¹ Strange's H.L. Vol. II. p. 122.

(P.C.). See also *Srimati Uma Deyi*

² *Behari Lal v. Shib Lall*, 26 All. 472 (1904).

v. *Gocoolanund Das Mahapatra*, 5 I. A. 40 (1878) : s. c. 3 Cal.

³ Strange's H.L. Vol. II. pp. 82, 118.

587 (P. C.) : s. c. in the High Court 15 B. L. R. 405 : 23 W. R.

⁴ Sutherland's Synopsis II.

840 (1875); *Chinna Gaundon v.*

⁵ 13 Moo. I. A. 85 (1869): s. c. 12 W.R. 29 (P.C.); s. c. 10 Sevestre 289

Kumara Gaundon, 1 Mad. H. C. R. 54. (1862) per Scotland C.J. at p. 57.

i. e., son to both to his uncle and natural father ; and they held that such an adoption would not sever the connection of the child with his natural family. A similar view was expressed by the Allahabad High Court in a very recent case, to which we have already referred. Their Lordships said : "It seems to follow from this that if the gift is a qualified gift, as it is in the case of an adoption in the absolute *dwyamushyayana* form, the son who is so adopted does not cease to have filial relation with his natural parents, nor is his relation generally with the family of his natural parent severed."¹ And their Lordships held in this case that the natural mother of a *Nitya dwyamushyayana* did not, on account of such adoption, lose her right of succession to her son in the absence of nearer heirs.

Whether *dwyamushyayana* form of adoption prevails in Bombay is a question which in the light of the observations of their Lordships in several reported cases may be answered in the negative. Mr. Steele, no doubt, states that though an only son should not be given in adoption, an exception may be made in the case of such an adoption by his uncle.² This certainly means a *dwyamushyayana*. But the decisions of the High Court, barring a few early cases, have been uniform in condemning the adoption of an only son. In 1839 a Full Bench decided that the adoption of an only son was absolutely invalid and the doctrine of *factum valet* could not improve the situation.³ Ranade J., in *Basava v. Linganganda*,⁴ (in which it was held that according to the custom of Lingayets in the districts of Dharwar and Bijapur the adoption of an only son was valid) in meeting the argument of the defence counsel observed thus :—“We may, however, observe in passing that the defendant’s counsel sought to give an unwarranted enlargement of the doctrine of *dwy-*

Whether *dwyamushyayana* prevails in Bombay.

¹ *Bikari Lal v. Shib Lal*, 26 All. 472 at p. 478; (1904).

² *Raghupati v. Krishnaji*, 14 Bom. 249 (F.B.) [1889].

³ Steele pp. 45, 183.

⁴ 19 Bom. 428 (1894).

mushyayana when he urged that it covered not only the cases of brother's sons, but brother's grandsons also. This enlargement was sought to be justified by the analogy of the rule of Hindu law by which the existence of a son, grandson or great grandson bars the way to adoption. This analogy, however, is too far-fetched to be readily accepted. The original *dwyamushyayana* son was a relic of the Niyoga form and as such this order of son is prohibited in Kaliyuga. (West and Bühler 3rd. Edn. p. 879). *Dwyamushyayana* of the second and more modern form is still permitted, but Rao Saheb Mandlik has stated in his work that he had not come across such adoptions in this Presidency (p. 506). Steele also (p. 183) has stated that such adoption seldom takes place. The Madras Sudder Dewany Adawlut came to a similar conclusion in 1859. On the other hand, the learned authors of the Digest state that this form obtains in the Southern districts of this Presidency (West and Bühler, 3rd Edn. p. 898), and Steele also refers to certain castes where it is still in vogue. (p. 385). The Judicial Committee of the Privy Council has recognized the existence of this form in the North-West Provinces ; and there are also some Bengal cases to the same effect.—*Wooma Daee v. Gokulanund Dass*, 3 Cal. 587. The presumption in the case of an adoption by a united brother would certainly be in favour of the son adopted being the son of two fathers. No such presumption can be made in the case of separated brothers, for the *dwyamushyayana* is not equally effective as the Dattaka son to secure the spiritual salvation of the person adopting.—*Srimati Uma Deyi v. Gokoolanund Dass*, 5 I. A. 51—as also of his natural father (West and Bühler, 3rd Edn. p. 899). It is, thus, not difficult to understand why this form of adoption should have become generally, if not altogether, obsolete in this Presidency. Even if it still exists, the best test of it is either the proof of a special agreement, or evidence to the effect that the son inherited, or has a right to inherit, in both families. There is no such proof

of agreement in the cases relied upon, and only one or two instances were cited where the son appears to have succeeded to the estates of both his father and uncle, who apparently were united. On this bye-issue accordingly, we find that the large bulk of the instances adduced on plaintiff's behalf are not touched by this ground of exclusion, and that for the purposes of this suit we may safely leave it out of consideration, except in regard to, at the most, two out of the twenty-five cases in which the custom of adoption of an only son has been satisfactorily proved."¹

From the above it would seem that *dwyamushyayana* is not altogether obsolete in Bombay, at all events not in the Southern districts of the Presidency. And from the authorities discussed and cited in the above passage it is also clear that this form of adoption is also recognized in the North-West Provinces and Madras. Dr. Jolly says: "I have been informed by Pundit Dundiraj of Benares, that in the N.W. Provinces also adoptions of the *Dwyamushyayana* type are very common now-a-days, though express stipulations to that effect are as unknown as the term *Dwyamushyayana*."² The Sudder Dewany Adawlut held in a case brought in the City Court of Benares that a woman after her husband's death was incompetent to give her only son in adoption as a *dwyamushyayana* without authority previously given by her deceased husband.³

Where *dwyamushyayana* prevails.

It is an universal rule in Bengal and Benares that a woman is not competent to adopt a son or give away her son in adoption, without the permission of her husband previously obtained. But according to the doctrine of *Vachespatti*, whose authority is recognized in Mithila, a woman

¹ 19 Bom. p. 454.

² *Debee Dial v. Hur Hor Singh*,

³ Dr. Jolly's Tagore Law Lectures. (1883.) p. 166.

4, S.D. Sel. Rep. 320 (407) [1828].

cannot, even with the previously obtained sanction of her husband, adopt a son after his death in the *Duttaka* form; and to this prohibitory rule—says Sir William Macnaghten—may be traced the origin of the practice of adopting in the *Kritima* form which is prevalent in Mithila.¹ But this cannot be said to be the reason of the existence of this species of adoption among the Nambudri Brahmans in the West Coast of Malabar. For there a woman is competent to adopt without her husband's consent.² Similarly a childless Brahman widow in Mithila may adopt a *Kritima* son without her husband's permission.³

The *Kritima* form of adoption has no connection with any religious ideas. No particular ceremonies appear to be necessary to such an adoption.⁴ Nor is there any restriction as to the age of the person to be adopted. The performance of *Upanayana* in his natural family is no bar to the acceptance of a boy in *Kritima* form.⁵ The adoptee must be of the same class as the adopter and must consent to the adoption.⁶ A *Kritima* son when adopted by a widow does not become the adopted son of her husband, even if the adoption had been permitted by him. The *Kritima* son will perform his adoptive mother's obsequies, and will succeed to his adoptive mother's property and has no claim to that of the collaterals. Such son would not, by virtue of such adoption, lose his position in his own family.⁷

¹ Macnaghten 97.

² *Vasudevan v. Secretary of State for India*, 11 Mad. 157 at pp. 174, 176. (1887).

³ Macnaghten 196.

⁴ *Kullean Sing v. Kirpa Sing*, 1 S.D. Sel. Rep. 9 (11), [1795].

⁵ Macnaghten 196.

⁶ Ibid.

⁷ *Musst Shabo Koeree v. Jugan*

⁸ Sevestre Part IV 383

(1867) : s. c. 4 Wyman 121 ; s. c. 8 W. R. 155 ; *Collector of Tirhoot v Hurropershad Mohunt*, 8 Sevestre Part IV 391 (foot note) (1867) ; s.c. 7 W. R. 391 ; *Musst. Deepoo v. Govreeshunker*, 3 S. D. Sel. Rep. 307 (410) [1824] ; *Musst. Sabitreea Daee v. Sutur Ghun Sutputtee*, 2 S. D. Sel. Rep. 21 (26) [1812] ; *Sutherland's Synopsis*,

In the *Kritima* form the consent of both parties is the only requisite.¹ So where a Mithila Brahman being on the point of death makes a verbal nomination of an absent person to be his adopted (*kritima*) son, it was held that the adoption was not valid, because the proposal 'be thou my son' and the consent 'I agree to become thy son' which are requisite in ratifying a contract of *Kritima* sonship were not complied with: the nominated son being absent at the time the offer was made by the dying adoptive father. An express consent of the person nominated for the adoption must be obtained during the life-time of the adoptive father. The offer to adopt is but the act of one of the contracting parties and, as being merely a proposal to enter into a contract, is insufficient by itself without the acceptance thereof or consent thereto by the other party.²

Consent by
both parties
essential.

In *Baboo Ranjit Sing v. Baboo Obhye Narain Sing*³ the Sudder Court has held that an elder brother cannot be the *Kurta putra* (*Kritima*) of a younger brother, for it is written in the *Dattaka Mimansa*, according to the doctrine of *Sounaka*, that an elder brother, an uncle &c. cannot become a son. Sir William Macnaghten, however, says that the authorities cited by the law officers in that case related exclusively to the *Dattaka* form of adoption. On the authority of Keshuba Misra in the *Dwaita Purishishta*, a man may adopt his own brother, even his own father.⁴ A daughter's or a sister's son may also be adopted.⁵ A son of a brother, even though he be an only son, may be taken

Who may be
adopted in
kritima form

¹ *Kullean Sing v. Kirpa Sing*, 1 S.D. Sel. Rep. 9 (11) [1795.]

² 2 S.D. Sel. Rep. 245 (315) [1877].

³ *Musst. Sutputtee v. Indranund Jha*, 2 S.D. Sel. Rep. 173 (221) [1816]; *Durgopal Singh v. Roopan Singh*, 6 S.D. Sel. Rep. 271 (340) [1839]; *Luchman Lal v. Roopun Lal Bhaya Gayal*, 16 W.R. 179 (1871).

⁴ See Macnaghten Vol. I. p. 76.

⁵ *Ooman Dutt v. Kunhia Singh* 3 S. D. Sel. Rep 192 (145) [1822]; *Chowdree Purnessar Dutt Jha v. Hunwoman Dutt Roy*, 6 S. D. Sel. Rep. 192 (235) [1837].

as *Kritima* son.¹ But in *Oomun Dutt v. Kunhia Singh*² it has been laid down that while a brother's son exists, the adoption of any other individual as a son, either in the *Dattaka* or *Kritima* form of adoption, is illegal. It seems the Pundits in this case founded their opinion on the texts of the *Dattaka* form of adoption. As a general practice any person may be adopted, with this restriction, that the adopted person must be equal in class or of the same tribe as the adopter.³

*Status of a
Kritima son.*

It is not uncommon in Mithila for the husband to adopt one *Kritima* son and the wife another. If they jointly appoint an adopted son, the latter stands in the relation of son to both and is heir to the estate of both. But if the husband adopt one person and the wife another, they stand in the relation of sons to each of them respectively and do not perform the ceremony of offering oblations, nor succeed to the estate of the husband and wife jointly.⁴ The relation of *Kritima* son extends to contracting parties only : the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father.⁵ A *Kritima* son does not lose his rights of inheritance in his natural family but takes both in his own family and in that of his adopting parents.⁶

Kritima form
in Jaffna.

Kritima form of adoption prevalent in Jaffna is very similar to that prevailing in Mithila. Mr. Mayne says "there is the same absence of religious ceremonies, the same absence of any assumed new birth and the same right of adoption both by husband and wife, followed by the same result of heirship only to the adopter."⁷

¹ 2 Macnaghten 197, case xviii (1824).

² S.D. Sel. Rep. 23 (29) at p. 27. (1812).

³ 3 S.D. Sel. Rep. 192 (145) [1822].

⁴ *Baboo Jaswant Singh v. Doolie Chund*, 25 W.R. 255 (1876).

⁵ 2 Macnaghten 196; *Musst Shubo Koeree v. Jugun Singh*, 8 Sevestre. Part IV 383 (1867); s.c. 4 Wyman 121: s.c. 8 W.R. 155.

⁶ *Musst. Dupoo v. Gowreecunker* 3 S.D. Sel. Rep. 410 (307) [1824].

⁷ Mayne's *Hindu Law and Usage* p. 219, 1892 Edn.; *Thesavalema*

Double adop.
tion.

How far a second adoption, while the first adopted son is existing, is valid or sanctioned by usage formed the subject of decision in several cases. Among the earliest cases, two that came before the Sudder Dewany Adawlut are *Shamchandra v. Narayani Debi*¹ and *Gauripershad Rai v. Musst. Jymala*.² The first case decided that a second adoption was valid when the first adopted son had died without issue. In the second case, a man, having two wives, gave authority to each of them to adopt a son. One of them made the adoption. He himself, together with the other wife, afterwards made an adoption. And it was held that the two sons were entitled equally to inherit from the husband of their adoptive mothers. The first case no doubt has very little bearing on the point of double adoption, but the second case certainly assumes the validity of such adoption. The Judicial Committee considered these cases as well as various authorities, both Hindu and European, in a case which came from the Province of Madras.³ The facts of the case were these : one V together with his wife adopted a son, J. V took a second wife and together with her adopted R in the life-time of J. The Privy Council held that the adoption of R was invalid. This was followed by other Courts in India and also by the Privy Council in later cases.⁴

It should be noted that in the above Madras case, (the *Rungama* case) though their Lordships of the Privy Council were unwilling to attach any value to the opinions of various Pundits examined in that case, as being more or

ii. It may be noted that the Tamils of Jaffna adopt boys as well as girls. In this respect their custom resembles that of the Burmans. See Buddhist Customs *infra*: under Adoption.

A. 1 (1846): s. c. 7 W. R. 57.

⁴ See *Joyohunder Rai v. Bhy-rubchunder Rai*, 2 Sevestre 575 s. c.: S. D. Decis 461 (1849); *Sudanund Mahapatter v. Bonomalee*, 1 Marshal 317 (1863); *Gopeelal v. Muest. Chundrabaloo Bhogjee*, I. A. 131 (1872) s. c. 11 B. L. R. 391: s. c. 19 W. R. 12.

¹ 1 S. D. Sel. Rep. 209 (1807).
² 2 S. D. Sel. Rep. 136 (174 [1814]).

Rangama v. Atchama, 4 Moo. I.

less influenced by the parties, yet they had to admit that the opinion of the Pundits of the Northern Provincial Court as well as that of the Centre and Southern Division of the Courts, taken before the institution of that case on this question of double adoption was certainly "as free as any opinion can be, from suspicion of undue influence," and in their opinion *the second adoption is good and both sons are equally entitled to inherit*. Though the *Rungama* case is supposed to have settled the point, yet we venture to submit that such adoption is sanctioned by the usage and custom of the people.¹

As to the plurality of adoption amongst the *Naikins*, see *infra*.

Simultaneous
adoption.

Double adoption may be successive or simultaneous, i.e., two sons adopted at the same day and time. This latter form of dual adoption is also held to be invalid.² We should note that there is a slight difference between *successive* and *simultaneous* adoptions. In the former, the first adoption is valid and the second invalid : whereas in the latter, both the adoptions are invalid. Phear J., sitting on the Original Side of the Calcutta High Court, decided the cases of *Monemothonath Dey v. Onauthnath Dey, and Siddessory Dossee v. Durgachurn Sett* and in the first case exhaustively considered all the authorities. But in view of the decision of the Judicial Committee in the *Rungama* case, his Lordship could not accept any other interpretation of the authorities cited before him. So, as there was no express law or authority on the point, his Lordship held that such simultaneous

¹ See Golapchunder Sastri's *Tagore Lectures on Adoption* p. 182 *et seq.*

² See *Monemathnath Day v. Onauthnath Day*, Bourke 189 O. S. April 20, 1865 : s. c. in appeal 2 Ind. Jur. N. S. 24 (1865) ; *Siddesorry Dassee v. Doorga Churn Sett*, 2 Ind. Jur. N. S. 22 (1865) : *Gyanendrachunder Lakiri v. Kalapahar Hajee*, 9 Cal. 50 (1882) : s. c. in Privy Council *Akhoy Chandra Bagchi v. Kalaphur Hajee*, 12 Cal. 406 (1885) ; *Doorgasoondari Dassee v. Surendra Kisor Rai*, 12 Cal. 686 (1886).

adoption was invalid. Apparently no evidence of custom was given at the trial. For, his Lordship said : " It was stated by the defendants' counsel that the usage and custom of Bengal gives a childless man the right to adopt one son in respect of each of his wives either simultaneously or not ; but, as I have already said, no such evidence as the Court considered admissible to establish a custom or usage was tendered during the trial."

Before we leave the subject of double adoption we may consider a widow's power of second adoption. The earliest case on the point is *Gournath Chowdhree v. Arnoporna Chowdrain*.¹ In this case the Bengal Sudder Court held that where a widow was directed to adopt a son she could not adopt a second son if the first adopted son died. But the Privy Council in a very recent case from Madras disapproved the ruling laid down in the above case and held that the widow's authority to adopt was not exhausted by the first adoption and the adoption of a second boy after the death of the first was valid.² The main factor for consideration in these cases is the intention of the husband. Any special instruction which he may give for the guidance of his widow must be strictly followed ; where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention. In the case under consideration the deceased Brahman placed no specific limitation on the power to adopt, his object being to secure spiritual benefit to himself and to continue his line. And their Lordships of the Privy Council approvingly quoted from the judgment of Mitter J., in *Ram Soondur Singh v. Surbanee Dassee*,³ passages bearing upon spiritual benefit and the performance of religious services necessary on different occasions for the good of the soul of the deceased father.

Widow's
power of
second adop-
tion.

¹ S. D. Decis 332 (1852).

145 (1906) : s.c. 10 C W.N. 921.

² *Karnepalli Suryanarayana v.*

22 W.R. 121 (1874).

³ *Pucha Venkata Ramana*, 33 I. A.

Jain adoption. The Jains are seceders from Brahmanical Hinduism and their religious tenets have more affinity to the precepts of Buddhists than to those of the Brahmans. They do not accept the Vedas of the Brahmans and differ from the latter in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They have neither *Tithi*, nor *Shradhha*.¹ They retain, however, many of the customs of orthodox Hindus.² In *Sheo Singh Rai v. Musst. Dakko*,³ the Allahabad High Court considered various authorities bearing upon Jain customs, commencing from 1833, and their Lordships held that it was not to be assumed that the Hindu law applied to the Jains. Though the Jains are termed "Hindu dissenters," they have their own usage and custom quite different from the normal Hindu law and usage of the country in which the property is located or the parties are residents. The adoption of tenets of another sect of Hinduism by some Jains will not necessarily affect the laws and customs by which the personal rights and *status* of the family were originally governed. As for instance, the custom which enables a Jain widow to adopt a son without the express or implied authority of her husband will not be affected by the conversion of the family to Vaishnavism.⁴

It is now settled that in the absence of a special custom or usage, the ordinary Hindu law will apply to the Jains. In *Chotay Lall v. Chunno Lall*⁵ the Privy Council said that "the custom of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and in the absence of proof the ordinary law must prevail."⁶

¹ See Abbé Dubois pp. 562-3, 1817 Edn. Ward's History of the Hindus pp. 229-30, cited by Best J. at, p. 184 in *Peria Ammani v. Krishnasami* 16 Mad. 182 (1892).

² *Bhagvandas Tejmal v. Rajmal*, 10 Bom. H.C.R. 241 (1873).
³ 6 N.W.P. (All.) 382 (1874).

⁴ *Manick Chand Golecha v. Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889).

⁵ 6 I. A. 15 (1878),
⁶ See also *Rukhal v. Chunnilal Ambuket*, 16 Bom. 347 (1891); *Buchebi v. Mukhan Lall*, 3 All. 55 (1880).

The Calcutta High Court said : "The authorities are conclusive that unless a custom be proved to the contrary, Jains are governed by the Hindu law of inheritance and ordinarily the Mitakshara School of law would be the system of law applicable to them. In each case there must be clear evidence to prove custom or usage which is invariably followed without question."¹

Doctrine of adoption prevails amongst the Jains though they do not believe the spiritual necessity or advantage of it. Adoption amongst them is absolutely of a secular character, and is generally governed by the Hindu law except in certain instances where special customs prevail.² *Giving* and *taking* of a boy is the essential part of a valid adoption among the Jains and no religious ceremonies are necessary.³ Where a natural father executed a deed or *ekrarnama* in favour of the adoptive father and by it recited that he (the natural father) had made over his third son to the sonship of the adoptive father, so that the latter might, whenever he would wish, fulfil the rites of adoption in accordance with the *Shastras* and the usage of the country, and from that day the natural father would have no claim or right in respect of the son, the High Court held that this deed did not of itself operate to effect an adoption. It did not even amount to a giving and taking of the boy as it contemplated the subsequent performance of the necessary rites.⁴ The age-limit of the adoptee may extend to 32 years.⁵ But according to Holloway J., there is no limit of age among the Jains.⁶

There is no restriction to the adoption of a sister's or

¹ *Mandit Koer v. Phool Chand Lal*, 2 C.W.N. 154 p. 158 (1897).

[•] *Mandit Koer v. Phool Chand Lal*, 2 C. W. N. 154 (1897).

² *Sheo Singh Rai v. Musst. Dukho*, 5 I. A. 87 (1878) : s.c. 1 All. 688 : s.c. in the High Court 6 N.W.P. 382 (1874).

⁵ *Maharaja Govind Nath Ray v. Gulal Chand*, 5 S.D. Sel Rep 276 (322) [1883].

³ *Lakshmi Chand v. Gatto Bai*, 8 All. 319 (1886).

⁶ *Rithourn v. Soojan*, 9 Mad. Jur. 21 cited in *Sheo Singh Rai v. Musst, Dukho*, 6 N.W.P. 382 p. 402.

daughter's son or mother's sister's son amongst the Jains.¹ A sonless widow has the same power of adoption as her husband would have had if he chose to exercise it. She is competent to adopt without the sanction of her husband, or for that matter, of any other person.²

Usage of ad-
option among
Sarogis of
Alighur.

By the usage of the sect of Sarogis in the Alighur district, who follow the Jain persuasion in contradistinction to the doctrines of the orthodox Hindu community, adoption at the age of nine years is valid, and, on the death of an adopted son without issue during the life-time of the adoptive mother, the further right of adoption vests in the widow and not in the mother.³ The Privy Council has laid down, upon the evidence given in the case, that, according to the usage prevailing in Delhi and other towns in the North-Western Provinces, among the Sarogi Agarwallas, a sonless widow has a right to adopt without permission from her husband or consent of his kinsmen, and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten.⁴

Among the
Oswal Jains.

A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband.⁵ In *Manick Chand Golecha v. Jagat Settani Pran Kumari Bibi*,⁶ it was contended that the *Oswals* and the *Sarogis* are not the same and therefore the customs and usages of the one

¹ *Sheo Singh Rai v. Dakho*, 6 N. W. P. 382 (1874); *Lakshmi*

Guttoo Bai, 5 N. W. P. Decis. (Sel. case) 465 [1853].

Chand v. Gatto Bai, 8 All. 319 (1886).

² *Sheo Singh Rai v. Musst. Dakho*, 5 I. A. 87 (1878) : s.c. 1 All. 688 : s. c. in the High Court 6 N. W. P. (All.) 382 (1874).

³ *Maharajah Gorind Nath Ray v. Gulal Chand*, 5 S.D. Sel. Rep. 276 (322) [1833]; *Sheo Singh Rai v. Dakho*, 6 N.W.P. 382 (1874); *Lakmi*

Chand v. Gatto Bai; 8 All. 319 (1886); *Manick Chand Golecha v. Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889); *Gorind Nath Ray v. Gulal Chand*, 5 S. D. Sel. Rep. 276 (1833).

⁴ *Manick Chand Golecha v. Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889); *Gorind Nath Ray v. Gulal Chand*, 5 S. D. Sel. Rep. 276 (1833).

⁵ *Musst, Chinnée Bai v. Musst.*

⁶ 17 Cal. 518 (1889).

should not be regarded as precedents for the others. But their Lordships were of opinion that the term Sarogi was synonymous with Jains¹ and the decisions in other cases were based on a custom prevalent among the Jains and not *as peculiar to any tribe or caste*. "This appears to be clear," say their Lordships, "from the analysis which is given in the judgment of the High Court, of the evidence upon which they found the custom proved. The parties in the present case admittedly came from the North-Western Provinces, and we think, therefore, that this case, like *Govind Nath Ray v. Gulal Chand*,² constitutes strong evidence in favour of the custom pleaded by the respondents." And further on their Lordships say : "We think, that the oral evidence taken in this case coupled with the judicial decisions in *Govind Nath Ray v. Gulal Chand*, and *Sheo Singh Rai v. Dakho* establishes the existence of a custom among the Jain Oswals, under which a widow may adopt a son to her husband even in cases where he has not conferred upon her an express authority to adopt."³

Adoption among Jains in the Bombay Presidency is, by custom, regulated by the ordinary Hindu law, notwithstanding their divergence from Hindus in matter of religion. Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated. The widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease. Not only a giving

Jains in the
Bombay Pre-
sidency.

¹ The word *Sarogi* seems to be a corruption of the *Sravakas* i.e. secular Jains; *Yatis* being the term for Jain ascetics. The secular Jains are mostly Vaisyas and includes various sects, such as Oswals, Agarwals, Parwars &c.—See Colebrooke's observations on the

sect of Jains, Asiatic Researches Vol. IX p. 287. Dr. Wilson's Works Vol. I. p. 276. Hunter's Statistical Accounts of Bengal Vol. XVI. p. 207. Golapchunder Sastri's Tagore Law Lect. 1888.

² 5 S.S.D. Sch. Rep. 276 (1833).

³ 17 Cal. 535.

but an acceptance by the man or his wife or widow, manifested by some overt act, is necessary to constitute an adoption by Hindu law.¹

**Marwadi
Jains of
Ahmadnagar :
alleged cus-
tom of adop-
tion where
both adoptive
parents dead.**

In *Bhagvandas Tejmal v. Rajmal*² it was alleged that there was a custom amongst the Marwadi Jains, both at Ahmadnagar and in Marwar, of adoption where both adoptive parents were dead. One A B died without leaving any natural born issue and without adopting any child. His wife, who survived him, resolved, shortly before her death, on adopting the son of C D (a brother of A B), but did not live to carry her intention into effect. After her death C D and E F (another brother of A B), with the assent of the *Punch* or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased A B and his wife and an instrument of agreement wholly founded upon that adoption was executed by E F to C D, and affected to deal with the property moveable and immoveable of A B. Westropp C. J., after laying down the proposition which should govern a Jain adoption in the Bombay Presidency as stated above, went on considering the evidence adduced in the case in support of the alleged custom and observed : "Some of them (witnesses) speak generally, as to the custom, but as already stated, it is to the specified instances that a Court of Justice pays most attention. And this is particularly so, where, as here, not a single *yati* or *pundit* or priest or other expert in the lore of the Jains or of Brahmans has been called to prove the alleged custom. The witnesses are chiefly shopkeepers, or cloth-sellers or *gomosthas*. There does not appear to be a man of learning amongst them. They *unanimously* admit that they cannot point to any authority in the book of the Jain sect which supports the alleged custom, nor do they pretend that it has ever been judicially

¹ *Bhagvandas Tejmal v. Amara v. Mukaduganda*, 22 Bom. Rajmal, 10 Bom. H. C. R. 241 416 (1896). (1878); *Rukhab v. Chunial* 10 Bom. H. C. R. 241 (1873). *Ambushet*, 16 Bom. 347 (1891);

recognized. There are in the whole body of evidence, to which our attention has been directed, only four specified instances of such adoption and of these the most ancient is one which occurs about 22 years ago, and one of the four breaks down, inasmuch as the widow of the adoptive father was living when the adoption is alleged to have taken place. There are then but three perfect instances established in proof, and of those, the most remote happened less than quarter of a century ago. It is impossible to regard such cases as proof of an ancient, still less of an immemorial custom unsupported as they are, by a single text from any book of authority amongst the Jains themselves or amongst the Hindus at large or by any *pundit*, *yati*, priest or other expert."¹ So the adoption in this case was held invalid and the instrument of agreement fell together with it.

In *Peria Ammani v. Krishnasami*² the custom of adoption, among Jains of Southern India was fully considered. There the question for consideration was whether a Jain widow can validly adopt without authority of her husband or consent of his kinsmen. Such an adoption according to Hindu law is certainly invalid. The Jains, as we know, are generally governed by ordinary Hindu law except where they set up special custom and clearly establish it. In this case the *onus* lay on the party seeking the declaration that the adoption in question is valid. As there was nothing to show that the parties in the suit are other than natives of Southern India whose ancestors have been converted to Jainism, and who have, in common with the orthodox Hindus, retained many customs and practices of the latter, they were required to prove by unimpeachable testimony that such adoption was sanctioned by custom. The party alleging such custom, however, failed to substantiate it. The learned Judges distinguished the case of *Rithcurn Lallah v. Soojun Mull*,³ in which Holloway J., decided the

Among Jains
of Southern
India.

¹ Ibid p. 368.

² 9 Mad. Ind. Jur. 21 (1873).

³ 16 Mad. 182 (1892).

question the other way. With reference to this case Best J., said : "It is to be observed that from the names of the parties to that suit, it is clear that they were immigrants from the north, and it may be that their ancestors seceded from the orthodox Hinduism centuries before the text of Vasishta 'Let not a woman give or accept a son unless with the assent of her husband' became a part of the Hindu law. But there is no reason whatever for supposing that the parties to the present suit are other than natives of South of India whose ancestors have been converted to Jainism."¹

In Bengal.

There are, however, cases in which adoptions by a Jain widow without the authority of her husband or consent of his kinsmen have been upheld on proof of special custom.² In a recent case the Calcutta High Court on the basis of the aforesaid cases, held upon the evidence, partly of judicial decisions, and partly of testimony, that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen. This case further laid down that in this respect there was no material difference in the custom of the *Agarwal Choruwal, Khandwal* and *Oswal* Sects of the Jains ; and that there was nothing to differentiate the Jains of Arrah from the Jains elsewhere.³

It should be noted that judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place unless it is shown that the customs are different ; and oral evidence of the same kind is equally admissible. There is nothing to

¹ 16 Mad. p. 192.

C. L. R. 193 ; *Lakshmi Chand v.*

² *Maharajah Gorind Nath Ray v. Gulal Chand*, 5 S. D. Sel-Report 276 (1833) ; *Sheo Singh Rai v. Musot, Dakho*, 6 N. W. P. Rep. 882 (1874) ; s. c. in P. C. 5 I. A. 87 (1878) : s. c. I All. 688 : s. c. 2

Gatto Bwi, 8 All. 319 ; *Manick Chand Golecha v. Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889).

³ *Harnab Pershad v. Mandil Das*, 27 Cal. 379 (1899).

limit the scope of the antiquity to the particular locality in which the persons setting up the custom reside.

Gyawals are a sect of Brahmans residing in the district of Gya. There exist, amongst them, peculiar and loose customs in regard to adoption and in particular that, although adoption of a son may be made so as to give him rights of succession to his adopting father, this will not necessarily sever his connection with his own natural father or his family. In the district of Gya there are many places of sanctity connected with ancient Buddhism, and the Gyawal Brahmans have the privilege of acting as guides to the pilgrims who visit these places, and thereby make considerable sums; and by adoption into different families facilities are given for the acquisition of property, without severing the adopted son's connection with his own family.¹ With regard to this loose practice of adoption prevalent amongst the Gyawals we reproduce certain observations made by the Subordinate Judge in the lower Court and quoted by their Lordships of the Privy Council:²—

“Even a person who gets another's property by gift assumes the surname of his donor and calls himself as his adopted son. This loose practice had its origin in order to induce the pilgrims of his donor to acknowledge the donee. These form the bulk of their (Gyawals') property and the greatest source of income of these Gyawals. In adoption even, they adopt anybody quite contrary to Hindu law. They adopt daughter's and sister's sons, and only son; and widows even adopt without their husband's authority previously given. From what time such practices arose does not appear from the evidence; but apparently from the decline of the Gyawal dynasty. These people are found in Gya alone, and their marriages etc., are confined to this place. The fabulous 1484 families of Gyawals have now dwindled

Gyawal
custom as to
adoption.

¹ *Lachman Lal Chowdhry v. at p. 55 (1894).*
Kanhya Lal Mowar, 22 I.A. 51

² *Ibid pp. 55-56,*

to 200 or 300. Hence every one, more for the pilgrims than for their properties, makes such gifts or adoption in favour of those whom he or she loves, and the donees call themselves adopted sons. This practice also does away with escheats.'

In *Musst. Luchmi Dai Mohutain v. Kissen Lall Pahari Mahaton Gayal*,¹ the plaintiff set up a special practice prevailing amongst the Gyawal community at Gaya, according to which when a Gayal priest dies childless, he is succeeded by his widow. As women cannot have their feet worshipped by pilgrims, she (the widow) takes a son in adoption in order that he may get his feet worshipped by the clientele of her family for her own immediate benefit and ultimately for the benefit of the adopted son, who upon her death, takes by inheritance her estate as well as the estate of her husband. The plaintiff further alleged that according to the practice and usage prevalent amongst the Gyawals a son so adopted may be dismissed for misconduct and replaced by another. The son adopted in this case was a married man, twenty-four years of age and already a father. It was held that the so-called adoption was neither a *dattuka* nor a *kritima* form of adoption and further as the special custom supporting such adoption was not proved, their Lordships declared the adoption as invalid. It may be noted, however, that the Subordinate Judge has held that a sonless Gyawal widow can, by custom, adopt a son even though he may have previously been invested with the sacred thread and married, but there was no custom by which an adoption so made could be cancelled in case of disobedience and general misconduct on the part of the adopted son. Upon appeal, however, the District Judge found that the custom of adoption set up by the parties was not established by evidence and the High Court said that they were bound by the finding of the District Judge that the custom alleged had not been established.

The *Naikins* or Dancing girls are a class of abandoned women, attached to pagodas or temples in Madras and Western India. They are also called *dasis* or *devadasis*.¹ As a rule they do not marry and are supposed to consecrate their life to the services of the gods or goddesses of their respective temples. But they, as a class, practise prostitution which, it may be noted, is recognized by Hindu law and usage and consequently the existence and continuance of such a class of temple-dancers have been condoned by the public. These *Naikins* in order to perpetuate their class and also with a view to secure heiresses for their estates are in the habit of taking minor girls as *adopted* daughters who, as they grow up, follow the profession of their adoptive mothers. But Hindu law does not sanction the adoption of girls, as that would be opposed to the very purpose and theory of adoption.

Adoption of girls among the *Naikins* is purely of secular origin and has not the remotest connection with spiritual motive. It requires no particular ceremonies to be performed on the occasion ; recognition alone being sufficient.² As to how girls are made *Naikins*, we take the following from Steele's *Law and Custom of Hindu Castes* :—"In the caste or profession of dancing girls, girls of beauty and accomplishments are made *Naikins* by the ceremony of applying *misce* (a powder made of vitriol) to their teeth ; cardamums are distributed to the guests ; turmeric is put on the girl's person ; after which a religious ceremony is performed in honour of the gods or *Peers*. The members of the caste are feasted, the "misse"

Adoption by
the *Naikins*
or Dancing
girls.

¹ "The word '*dasi*' in its ordinary and accepted signification means a dancing girl in a pagoda. The Tamil expression means 'the slave of *deus*' (gods). The dancing girls are admitted as *dasis* after a certain ceremony in the temple called the tying of *bottu* or *thali*. This has

been put a stop to since the passing of the Indian Penal Code."—Vide *Muttukannu v. Parmasami*, 12 Mad. 214 p. 216 (1888).

² *Venkatachellum v. Venkataswamy*, Mad. Decis. (1856) p. 65 ; Steele's *Law and Custom of Hindu Castes* p. 186.

is applied by several Naikins, one of whom, of hereditary office and repute in caste, takes the girl on her lap, and presents her with a *Saree*. A girl of another caste may be made a Naikin. In general, expense is incurred by obtaining the sanction of creditable Naikins. The *misee* of a daughter precedes that of a *paluk-kanya* or adopted girl."

As regards the validity of an adoption of a girl by a Hindu we have a distinct decision of the Bombay High Court, where it has been held that the adoption of a daughter by a Brahman is invalid under the Hindu law.¹ Knowing the object and purpose of a Hindu adoption and having in view the dictum of the Shastras "Males only need sons to relieve them from the debt due to ancestors"² and in the absence of any authorities³ in support of such adoption, the Court could not have come to any other conclusion. The question of custom was not raised in the case.

In Bengal.

Though it is well-known that the adoption of daughters among prostitutes and dancing-girls is practised too frequently and sanctioned by immemorial usage of the class or caste, yet the question of the validity of such adoption did not come for decision of a Court of Law until the year 1818, when the Supreme Court of Calcutta had to determine the point incidentally in *Hencower Bye v. Hanscower Bye*.⁴ There, the Court, on the basis of the opinion of the Court Pandit, who, in answer to question referred to him by the Court, said that there was no such instance of the adoption of a daughter to inherit by

¹ *Gangabai v. Anant*, 13 Bom. 690 (1888). supported only by some Puranic instances"—See 13 Bom. 690.

² Colebrook's Digest Bk. V. T. 273 Comm.

³ Jagannath says that only a male can be adopted and not a female.—*Vyarahara Mayukha* Chap. IV, s. v. *Para v.* Nunda Pandit was in favour of adoption of daughters on the basis of peculiar spiritual benefit derived from the gift of a daughter in marriage and from daughter's son. See Golapchunder Sastrî's *Tagore Law Lec.* (1888) p. 144.

"Adoption of a daughter is not warranted by any Smriti. It is

⁴ 2 Morley's Digest 133.

Hindu law, rejected the plea of adoption. It should be noted that there was no pleading of special custom in the case and the so-called adoption was found to be without any actual ceremony: the adoptive mother having taken the girl when a mere child in her family and having always treated her as her daughter who also followed her adoptive mother's profession. It was not contended that such adoption was in accordance with the usage and custom prevalent among the prostitutes.

In Madras there is a body of decisions on the subject, extending over a period of more than half a century. The latest decisions on the point declare such adoption by the Naikins as invalid since they are made with criminal intention *viz.*, prostitution of minor girls, and thus transgressing the express legislation, *i.e.*, the provisions of secs. 372 and 373 of the Indian Penal Code. It would seem, however, that the giving and accepting of a minor girl for adoption by a dancing woman is not *per se* an illegal act: but it becomes so if the specific intent which makes the act criminal is established. One of the latest cases on the subject is *Kamalakshi v. Ramasami Chetti*,¹ decided by Best and Subramania Ayyar JJ.. The former reviewed all the cases on the point in a well-considered judgment, and came to the following conclusion: "There is thus authority for the following positions (*i*) that the institution of dancing women cannot be ignored by the Courts, (*ii*) that adoption by such women is not necessarily illegal. And (referring to *Q. E. v. Ramanna*²), this case is also authority for the position that if the adoption was made with the intention of training the child to a life of prostitution, the act would be criminal."³

In a later case, where the adoption took place in 1871 (*i.e.* subsequent to the Indian Penal Code, which came into force in 1861), when the girl was six

¹ 19 Mad. 127 (1895).

² 19 Mad pp. 136-137.

³ 12 Mad. 273.

years old, and was made with the intention of bringing her up to practise prostitution even during her minority, it was held that such adoption was invalid.¹ But where adoption took place prior to the coming into force of the Indian Penal Code, it was regarded as valid.² We should mention here that the view, *viz.*, the Courts should not recognize an institution such as that of dancing girls, the object of which is prostitution, and the gain to be derived from that source, was expressed in one of the earliest Madras cases.³ But with reference to this case Best J., says "it is open to question whether *Chinna Ummayyi v. Tegarai Chetti* has not been overruled by a subsequent decision reported in the same volume, *Kamalam v. Sadagopa Sami*.⁴ No doubt the latter case was sought to be distinguished from the former on the ground of its including a claim for honours and income as appurtenant to the hereditary office of dancing girl which plaintiff was seeking to recover ; but as observed by Muttusami Ayyar J., in *Venku v. Mahalinga*⁵ 'it is not clear how, if the custom which is the source of the hereditary right to the office is an immoral custom, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right'.⁶

In Bombay,

The view expressed in *Chinna Ummayyi's* case found some support in the dicta of West J., in *Mathura Naikin v. Esu Naikin*,⁷ who held that adoption by the *Naikins* cannot be recognized by Courts of law and confers no right on the person adopted. His Lordship further observed that an adoption by a woman presupposes a husband to whom she adopts as her representative, and a *Naikin*, while she remains a *Naikin*, can have no husband.

¹ *Sanjivi v. Julajakshi*, 21 Mad. 229 (1897).

Chetti, 1 Mad. 168 (1876).

² 1 Mad. 356 (1878)

³ *Venku v. Mahalinga*, 11 Mad. 393 (1883); *Muttu Kannu v. Paramasami*, 12 Mad. 214 (1889).

⁴ 11 Mad. 393 (1888).

⁵ *Kamalakeshi v. Ramasami Chetti*, 19 Mad. 127, p. 136 (1895).

⁶ *Chinna Ummayyi v. Tegarai*

⁷ 4 Bom. 545 (1880).

So a *Naikin* cannot adopt at all. The latest Bombay case about the Naikins is *Tara Naikin v. Nana Lakshman*.¹ There Sargent C. J., referred to the decision in *Mathura Naikin* as having been disapproved of by the Madras High Court in *Venku v. Mahalinga*² and observed as follows:— “In *Mathura Naikin* West J., speaking of temple dancers says it is a question ‘whether in such circumstances the endowments enjoyed by such guilds of women ought to be recognized and protected by the law without a reform of their essential constitution’. However in *Kamalam v. Sudagopa Sami*³ such endowments were recognized. Now the existence of dancing girls in connection with temples is according to the ancient established usage of the country and this Court would, in our opinion, be taking far too much upon itself to say that it is so opposed to the ‘legal consciousness’ of the community at the present day as to justify the Court on refusing to recognize existing endowments in connection with such an institution.” The lower court in this case rejected the claim of the plaintiff (who, as the adopted daughter of a dancing girl, attached to a temple, sued to redeem and to have her right to manage the *inam* lands assigned as the remuneration for the temple office recognized), on the ground that the adoption could not be recognized by the Civil Court. The High Court reversed the decree and ordered a retrial having regard to the above remarks.

Where a prostitute, not a *Naikin*, adopted a girl of thirteen years of age as her daughter and by a will left all her property to the adopted daughter so that the latter could perform the former’s funeral ceremonies and inherit her property, and where there was nothing to show that she contemplated the girl following the profession of a prostitute, the Court held that such adoption was valid, and

Adoption by
a prostitute.

¹ 14 Bom. 90 (1889).

² 1 Mad. 356 (1888).

³ 11 Mad. 393 (1888).

that the adopted daughter was entitled to the property under the will.¹

Plurality of
adoption
among the
Naikins.

Double or simultaneous adoption may be contrary to the doctrine of Hindu law, but it has been found that the custom obtaining among dancing girls in Southern India permits plurality of adoption. In *Muttu Kannu v Paramasami*² a dancing woman adopted first one daughter and subsequently, in the life-time of the latter, adopted another daughter. The question for decision was whether such custom ought to be recognized as having the force of law in the class in which it obtained. Their Lordships referred to *Venku v Mahalinga*³ where a Naikin, in South Canara, affiliated three girls and a boy and all four lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. It would seem that in this partition suit, at least, such adoption was considered valid. But subsequently when one of the adopted girls (call her T) died in 1880 leaving certain property and one of the surviving sisters (call her V) sued to recover T's estate from T's uterine brother, the Court held that though the adoption of a daughter by a Naikin can be recognized by the Civil Courts, there being no warrant for plurality of adoption in the analogies of Hindu law and *no special custom having been proved*, V could not claim T's estate. In *Muttu Kannu's* case, however, there was the undisputed evidence of custom of the caste or class, and the adoptions in question took place before the Indian Penal Code came into force. So their Lordships held that according to the custom obtaining among dancing women in Southern India plurality of adoption was valid and conferred the rights and *status* of a daughter on the adopted girls. The same question arose in *Sanjivi v. Jalajakshi*.⁴ There the plaintiff sued to recover a moiety

¹ *Manjamma v. Sheshgiri Rao*,
26 Bom. 491 (1902).

² 12 Mad. 214 (1888).

³ 11 Mad. 393 (1888).
21 Mad. 229 (1897).

of the property left by a deceased dancing woman who had adopted successively the defendant and the plaintiff. But as the adoption of the plaintiff was found to be invalid, on the ground that it was done with the criminal intention of bringing her up to practise prostitution even during her minority, the Court did not go into the second objection to the validity of the adoption, *viz.*, that there was no sufficient proof of local usage sanctioning a second adoption by a dancing girl during the life-time of a daughter previously adopted. So the position is this: plurality of adoption by the Naikins is good if authorized by caste or local custom; but if such adoption is made with criminal intent, it will be illegal and invalid.

We have already noticed that by *Kulachar* of the family an adoption may not be permitted.¹ In *Patel Vandravan Jekisan v. Patel Manilal Chunilal*,² a custom prohibiting a widow from adopting a son was set up. The Subordinate Judge held that there existed among the Kadwa Kunbi caste of Amedabad such a caste usage forbidding a widow to adopt without the express consent of her husband. He did not record a distinct finding on this point but said that he was inclined to believe in the existence of such a caste usage, on the ground that in Borrodaile's collection of caste rules it was said that Kadwa Kunbis at Surat could not adopt; that the oral evidence on the record showed that a widow of the Kadwa Kunbi caste could not adopt without the express authority of her husband; that the defendant's pleader admitted that with the exception of two cases no other instance had occurred in the Kadwa Kunbi caste;

Prohibition of
adoption by
custom.

¹ See Family Customs *supra*. *Rajah Bishnath Singh v. Ram Churn* (1884).
Mujmoodar, 6 S. D. Decls. 20 (1850); *Fanindra Deb Raikat*,

² 15 Bom. 565 (1890).

lastly, that it was highly probable that there would be such a custom in a caste in which widows freely contract *Natra* marriages and would be able by adopting to frustrate the Hindu Widows' Marriage Act XV of 1856. The Sub-ordinate Judge also admitted in evidence under s. 32 (4) of the Indian Evidence Act a statement signed by several hundred witnesses to the effect that a widow of the Kadwa Kunbi caste could not adopt without the express authority of her husband. As this statement was illegally admitted and was therefore inadmissible to prove the alleged custom, the High Court remanded the case for a clear finding on the following issue :—Whether, according to the custom or caste usage of the Kadwa Kunbi caste of Ahmedabad, the adoption by a widow was forbidden without the express consent of her husband. The finding of the Subordinate Judge on the issue was in the negative. Sargent C.J., said : “Although the spiritual efficacy of adoption is probably not much regarded by the members of the Kunbi castes, a caste custom prohibiting widows from adopting is one which, before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden. That evidence, we think, was not forthcoming in the present case. The statements of two hundred and two witnesses called by the plaintiff doubtless show that it has not been the practice in the caste for widows to adopt; but it also shows there has been no caste resolution forbidding such adoption. At the same time the evidence establishes that there have been, as a matter of fact, two adoptions by widows, so far back as 1881, and 1882, without any caste protest against them; and that the latter of these adoptions was actually impugned in Court, but nothing was stated at the time as to its being contrary to caste custom—and, lastly, that the adoption in question was attested by sixteen patels of the caste, which could scarcely have taken place had there been a well-established custom forbidding such an adoption. This evidence, as a whole,

leads, we think, to the conclusion that, in the language of Mr. Mayne, 'a uniform and persistent usage had not moulded the life of the caste.' It is also to be observed that this particular caste is not mentioned in Borrodaile's Caste Customs when alluding to other Kunbi castes of Gujarat in connection with such a custom."¹ So the plaintiff's suit was dismissed as the alleged custom was not proved.

Similarly in another case the Privy Council, in concurrence with the findings of the lower courts, held that a custom alleged to exist in the Hindu caste of Chudasama Gameti Garasias of Ahmedabad in Bombay prohibiting adoption was not proved. Their Lordships observed : "The evidence adduced to show that adoption is forbidden by the custom of the caste consists entirely of what is said by a number of witnesses, who say that if a man dies leaving a widow and no son, the widow cannot adopt a son and that no custom to adopt is recorded. But it appears that there are no written rules as to custom. Some instances to prove the statements made by the witnesses are adduced ; but as pointed out by the Subordinate Judge they are all explicable on other grounds than the existence of alleged custom."²

In Gujarat and in the Marathi country a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him if the act is done by her in the proper and *bond fide* performance of a religious duty and neither capriciously nor from a corrupt motive.³ Parke J., said : " According to the native text-writers, it seems to be clear that the strictness of that law (*viz.*, an adoption by a widow after her husband's death, without any authority from him is invalid) has been in many districts, relaxed or modified by local usage ; and the opinion of the Shastris, as published in Mr. Borrodaile's Bombay Reports, is very strong to show

Among
Chudasama
Gamati
Garasias of
Ahmedabad.

Widow's
power to
adopt in
Gujarat and
the Marathi
country.

¹ *P. V. Jekisan v. P. M. Chunilal*, 16 Bom. 470 p. 476 (1891). 27 Bom. 492 s.c. 7 C.W.N. 716.
² *Rakmabai v. Radhabai*, 5 Bom. H.C.R. A, C, J. 181 (1868),
Hiraba, 30 I.A. 234 (1903) 2 s.c.

that in the *Marhatta States, to the West of the Peninsula, the law does not require any such authority to render the act valid.*¹ But the adoption must not have been expressly forbidden by the husband, and must not have the effect of divesting an estate already vested in a third person.² A widow has implied authority from her husband to adopt even though her husband be a minor. Where a widow adopts there is a presumption that she has performed the duty from proper motives and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive.³ An elder widow has the power to adopt a son to her deceased husband without the consent of a younger widow. Sir Richard Couch said : "It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish. But on the other hand, if an adoption is regarded as the performance of a religious duty and a meritorious act to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent, being entitled to a due provision for her maintenance ; and if she refuses, the elder widow may adopt without it."⁴

In the Dravida country

a Hindu widow may, without having her husband's express permission, adopt a son to him, but she must be *duly authorized by his kindred* to do so. In the case of an undivided family the requisite authority to adopt must be sought within that family and cannot be given by a single, separated and remote kinsman.⁵

¹ *Raja Haimun Chull Singh v. Koomar Gunshum Singh*, 2 Knapp 203 p. 221 (1834).

² *Patel Vandravan Jekisan v. Patel Manilal Chunilal*, 15 Bom. 565 (1890).

³ *Ibid.*

⁴ *Rakmabai v. Rudhubai*, 5 Bom.

H.C.R. 181 p. 192 (1868).

⁵ *The Collector of Madura v. Moottoo Ramalinga Sethupathy*, 12 Moo I.A. 397; *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Putta Deo*, 1 Mad. 69 (P.C.) [1876].

In *Ravji Vinayakrav Jagannath Shankarsett v. Luksh-mibai*¹ it was alleged that according to the custom of the *Dairadnya* caste an adoption by an untunsured widow was invalid. For the purpose of proving such custom the evidence was tendered to the following effect: (i) that there had been many instances of adoption in the caste and in every such case the adopting mother had undergone tonsure and that there had been no instance the other way; (ii) that the caste was divided in opinion as to the validity of the adoption, but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The Court refused to allow such evidence to be called, holding that "it would merely prove what the court, in the absence of evidence to the contrary, would assume to be the case, *viz.*, that the widows of the caste usually or invariably followed the dictates of the Hindu ceremonial or religious law, which ordains that widows shall shave their heads, and that it would prove nothing more; and with regard to the opinion of the caste, that such opinion, even if expressed by a majority at a caste meeting, as it would not of course be binding upon the Court, ought not to affect its judgment." The Court, however, held the adoption in the case as valid, as the widow, before taking part in the religious ceremonies requisite for adoption, consulted *Shastris* as to whether she, while untunsured could properly do so, and according to the opinion of the latter she, having made certain expiatory gifts, was pronounced competent. Under such circumstances the Court could not hold her to be incompetent. Even if the *Shastris* were of a different opinion, a Civil Court, "could not decide between conflicting opinions upon such a question of ecclesiastical etiquette."

Adoption by
untunsured
widows among
Brahmans of
Dairadnya
caste.

This case has laid down that if an adoption be performed with all the requisite rites, with the assistance of priests, and in accordance with the opinions of the *Shastris*, the

Court will uphold it, even against the opinions of other *Shastris* expressing or entertaining contrary views.

Datta Homam.

In the last case Farran J., said that he should hesitate long before holding that an adoption is valid among Brahmins, even in Western India, without the performance of the essential religious rites.¹ We have already observed that even *Datta Homam*, or oblation to fire, is not an essential ceremony even in the case of three regenerate classes. Sir Thomas Strange says that the sacrifice to fire is important in a spiritual point of view, but it is so with regard to Brahmins only by whom the *Datta Homam*, with holy texts from the Vedas, can properly be performed. "The other classes, and particularly the Sudra, upon this, and other like occasions, perform an imitation of it, with texts from the Puranas. And even with regard to Brahmins, admitting their conception in favour of its spiritual benefit, it by no means follows that it is essential to the efficacy of the rite, for civil purposes; but the contrary is to be inferred; and the conclusion is that its validity, for these, consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only or the eldest son of the giver; *the prescribed ceremonies not being essential*. Not that an unlawful adoption is to be maintained; but that a lawful one, actually made, is not to be set aside, for any informality that may have attended its solemnization."²

A full Bench of the Calcutta High Court has decided that amongst Sudras in Bengal no ceremonies in adoption are necessary: the giving and the taking of the child constitute a valid adoption.³ The Madras High Court following this

¹ *Ibid* p. 395.

(F.B.) [1874]: s.c. 13 B.L.R. 401.

² Strange's *Hindu Law* Vol. I, pp. 96-97; see Dr. Jolly's Tagore Law Lec.: (1883) p. 159.

This was affirmed in appeal by the Privy Council, see *Indramani Chowdhurani v. Behari Lal Mullick*, 7 I. A. 24 (1879): s.c. 5 Cal 770: s.o. 6 C. L. R. 183.

³ *Behari Lal Mullick v. Indramani Chowdhurani*, 25 W. R. 285

decision held that adoption by a Sudra widow under pollution was not invalid.¹ As the females of the regenerate class labour under the same religious disability as the Sudras, the same Court in another case² laid down that in the event of an adoption by a female of the Brahman caste the performance of *Datta Homam* was not essential. Following this ruling it was held that among Kshatriyas in the Madras Presidency an adoption without religious ceremonies was valid.³ But in a subsequent case a doubt was expressed as to the correctness of the last case and it was held that *Datta Homam* was an essential ceremony in adoption among the Brahmans.⁴ A Full Bench, however, has held that the ceremony of *Datta Homam* is not essential to the valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same *gotra*.⁵ In a very recent case where a Brahman after taking a boy in adoption died without performing *Datta Homam* which was solemnized by his widow after his death, it was held that the adoption was valid.⁶

A full Bench of the Allahabad High Court has held that in the case of *Dakhani Brahmans* the *Datta Homam* or any other religious ceremony is not recognized to give validity to the adoption of a brother's son; the giving and taking of the child is sufficient for that purpose.⁷ The parties were Dakhani Brahmans, whose family came from Poona about a hundred years ago into the Jalaun District. Stuart C. J., said: "It thus appears that the parties in the case are not bound by the law of adoption prevalent in Bengal or any part of Bengal, but being Marhattas, are entitled to have administered in their family relations

Among Da-
khin Brah-
mans.

¹ *Thangathanni v. Ramu Mudali*, 5 Mad. 858 (1881).

⁴ *Venkata v. Subhadra*, 7 Mad. 548 (1883).

² *V. Singamma v. Vinjamuri Venkatacharlu*, 4 Mad. H.C.R. 165 (1868).

⁵ *Govindayyar v. Dorasami* 11 Mad. 5 (1884).
⁶ *Subbarayar v. Subbammal*, 21 Mad. 497 (1898).

³ *Chandramala Patti Mukaderi v. Muhammeda Patti Mahadevi*, 6 M.L. 20 (1882).

⁷ *Atmaram v. Madho Rao*, All. 276 (F. B.) [1884].

the law of adoption as current and practised in the Marhatta States. So considered it is perfectly clear to me that the *fuctum* of adoption, as evidenced by the form of giving and taking without any other ceremony, is all that is absolutely essential and that therefore the Judge is right in upholding the adoption in the present case, in which the parties are of the same family or *gotra*. I may add that it appears from the authorities that a like practice of the law of adoption is generally prevalent not only in the Marhatta States but in Western India generally and also in some parts of South India."¹

**Gift of a son
in adoption
by a Hindu
convert**

A very curious point was raised in a very recent Bombay case.² There the question was whether the adoption of a Rajput was valid, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, and who was given in adoption by his uncle to whom the natural father had given the necessary authority. The Court held that it was valid, as a Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism. But, does this hold good in the case of Brahmans among whom the *datta homam* ceremony is necessary? With reference to this point the Court observed as follows:— “Adoption may be regarded as a civil transaction as well as a religious ceremonial. If civilly the father is competent to give, he is equally competent to sanction the giving. Were the parties here Brahmans and not Rajputs, and *Datta Homam* essential, then possibly the father after becoming a Mahomedan could not sanction his brother to be present at the giving during the *datta-homa*, but the point does not arise here. The question is really narrowed to this:—If the father is not civilly dead, if

¹ See 4 Mad. H. C. R. p. 165 and 83 (1821).

Huebut Rao Mankur v. Govinda Rao Bulwant Rao Mankur 2 Borr. 25. ² *Sham Sing v. Santabai*, Bom. 551 (1901).

he is still the guardian of his son, why should he not be able to exercise his volition and sanction his son being given in adoption according to the Hindu religion? The son is still a Hindu: he is one who may be taken in adoption. We see no reason why the adoption should not be treated as invalid."¹ On the basis of this case it has been held that a Hindu becoming a Brahmo can validly give his son born while a Brahmo in adoption to a Hindu.²

Adoption of
a son of a
Brahmo by a
Hindu.

It should be noted that in the case of Sudras many restrictions to adoption are relaxed. As, for instance, the adoption of a Sudra boy, otherwise eligible, is permissible at any age previous to his marriage as that of boys of the higher castes is at any age before investiture with the thread (*Upanayana*).³ This holds good in Bengal, Benares and Madras. In Western India even a married man with a son may be adopted.⁴

Adoption by
Sudras.

The rule of propinquity which forbids a Hindu to adopt a boy whose mother he could not have married—such as mother's sister's son⁵ or a daughter's or a sister's son⁶—does not apply to Sudras. Similarly the prohibition against adopting an only son or eldest son has no force

¹ 25 Bom. p. 555.

² *Kusum Kumari Roy v. Satyaranjan Das* 30 : Cal., 999 (1903) : s.c., 7 C.W.N. 784.

³ *Kerutuvarain v. Musst. Bhuneswar*, 1 S.D., Sel. Rep. 161 (1806); *Musst. Dullabh De v. Monjee Beebe*, 5 S.D. Sel. Rep. 50 (1830); *Ram Nitrodaye v. Bholanath Das*, 9 S.D. Decis 553 (1853).

⁴ *Raje V. A. Nimbalkar v. Jayavartrav*, 4 Bom. H. C. R., A. C.J. 191 (1867); *Mhalsabai v. Vithoba Khandappa Gulre* 7 Bom., H. C. R., App., 26 (1862); *Nathaji Krishnaji v. Hari Jagaji* 8 Bom., H.C.R., A.C.J., 67 (1871).

⁵ *Chinna Nagayya v. Peda Nagayya*, 1 Mad., 62 (1875). See *Bhagwan Singh v. Bhagwan Singh* 26 I.A. 153. (1899) : s.c. 3 C.W.N. 454 : s.c. 21 All. 412 s.c.

⁶ Expressly permitted by the *Shastras*. Vide Macn. H.L. Vol. I. p. 67. Nareda cited in Dutt Nir; Strange's H. L. Vol. 1. pp. 83, 84; Dutt Mim Sec. ii, 74, 93, 95 et seq. *Rajcoomar Lall v. Bisheswar Dayal* 10 Cal., 688 (1884) among Kayashas of Bihar; *Phundo v. Jangi Nath* 15 All., 327 (1893) sister's son among *Baggals*; *Jiwani Lal v. Kella Mull* 28 All., 170 (1905) among *Purbia Kurmis*,

among them.¹ Nor are any ceremonies, besides giving and taking a child, necessary for the validity of a Sudra adoption.²

Adoption by Regenerate classes.

Restrictions regarding age and propinquity of the child to be adopted and the performance of religious ceremonies are rigidly observed among the three regenerate classes. Their non-observance in certain Provinces is justified on the ground of custom or usage. We will now note some of these customs or exceptions to general rules.

Age.

According to Hindu text-writers a child must not be adopted whose age exceeds five years or upon whom the ceremony of tonsure has been performed in his natural family.³ But the decisions of the Sudder Dewany Adawlut are not uniform on the point. In two cases the Pundits gave the opinion that a boy exceeding five years in age could be adopted if the tonsure had not been performed in the natural family. In two other cases it was broadly laid down that amongst the higher castes adoption is permissible *at any age* before investiture with the thread.⁴ In Madras the same rule has been repeatedly laid down.⁵

Vide Macn. Vol. 2 p. 187. note. (adoption of a daughter's son). *Gopal Narhar Safray v. Hanmant Ganesh Safray* 3 Bom 273 (1879) among Lingayets (who are members of the Sudra and not of Vaishya class) daughter's or sister's son.

¹ *Mhalsabai v. Vithabai Khan-dappa Gulre* 7 Bom., H. C. R. App. 26 (1862). But see *Mannick Chander Dutt v. Bhagabuty Dassee* 3 Cal. 443 (1878) which says that adoption of an only son is invalid in Bengal and the prohibition applies to *Sudras* as well as to the higher classes. *Basava v. Linganganda* 19 Bom. 428 (1894) among Lingayets, adoption of the only son is valid.

² *Indramoni Chowdhurani v. Behardul Mullick*, 5 Cal. 770 (P.C.).

[1899] : s.c. 4 Shome, Notes p. 43. s.c. in H.C., 13 B.L.R., 401 (F.B.)

³ *Datta Mima* iv § 22 ; *Datta Chand* ii § 25. But see *Kecut-narain v. Musst. Bhabinesree* 1 S. D. Sel. Rep. 161 (1806), *Dullubh De v. Manee Bebee* 5 S. D. Sel. Rep. 50 (1830); *Ranee Bullabakant Chowdhuree v. Kishenprea Dassee* 6 S. D. Sel. Rep. 270 (219) [1838]; *Ranee Nitrodaye v. Bholanath Dass* 9 S. D. Decis. 553 (1853).

⁴ *Ramkrishore Acharja Chowdhuri v. Bhoobunmoyee Debia Chowdrani*, S. D. Decis. 229 (1859), affirmed on review S. D. Decis. 485 (1860) : s.c. in P.C. 10 Moo. I.A. 279 (1865) : s.c. ; 3 W. R. 15 (P.C.).

⁵ *Mootvo V. R. Salooputty v.*

In *Viraraghara v Ramalinga*¹ it has been laid down that according to the custom obtaining amongst Brahmans in Southern India, the adoption of a boy of the same *gotra*, after the *upanayana* ceremony has been performed, is valid. The usage in Pondicherry admits of adoption after the *upanayana*.² In *Ramaswami Iyen v. Viraragava Iyengar*³ it has been held that the restrictions against the adoption of one on whom the *upanayana* ceremony has been performed in his natural family is clearly directed to a case where the *gotra* of adoption is different from that of the natural father of the boy adopted. In Western India and Bombay there is practically no restriction of age. It is a settled fact now that in these provinces not only among Sudras, but among Brahmans also, even a married man may be adopted and it is immaterial whether he belongs to a different or to the same *gotra* as the adopter.⁴

The general rule of prohibited degrees based on Propinquity. incestuous theory is not observed. The rule of prohibited degrees is not observed universally by the three regenerate classes. In Mithila the adoption of a sister's son in the *krilima* form is valid.⁵ In Southern India adoptions within the prohibited degrees are quite common even among the Brahmans. In *Fayidinanda v. Appn*⁶ a Full Bench has

Seragamy Nachiar, 1 Mad. Decis. 106; *Vythilingo Muppanar v. Vyia-thamal*, 6 Mad. 43 (1882); *Pichurayyan v. Subhugyan*, 13 Mad. 128 (1889).

¹ 9 Mad. 148 (1883).

² 1 Gibelin 94 cited in Mayne's H.L. p. 151.

³ 8 Mad. Jur. 58 (1873).

⁴ 4 Bom. H.C.R. A.C.J. 191 (1867); 8 Bom. H.C.R. A.C.J. 67 (1871); *Nadashiv Moreshwar Ghate v. Hari Moreshwar Ghate*, 11 Bom. H.C.R. 190 (1874); *Lakshmappa v. Ram-aru*, 12 Bom. H.C.R. 364 (1875); *Dhurma Dagu v. Ramkrishna Chimanji*, 10 Bom. 10 (1885).

⁵ *Chowdree Purmessner Dutt*

Jha v. Hunnoman Dutt Roy, 6 S. D. Sel. Rep. 235 (192) [1837]. See *Bhugwan Singh v. Bhugwan Singh*, 26 I.A. 153 (1899): s. c.

21 All. 412 : s.c. 3 C.W.N. 454, adoption of mother's sister's son is void. *Musst. Lali v. Murli Dhur* 10 C.W.N. 730 (P.C.) [1906], adoption of a sister's son among Marwari Brahmans is not warranted by family custom and invalid according to the general Hindu Law. *Baboo Ranjit Singh v. Baboo Obhye Naraien Sing*, 2 S.D. Sel. Rep. 245 (315) [1887], a brother cannot be adopted in Mithila.

⁶ 9 Mad. 44 (1881).

held that the custom, which exists among Brahmans in Southern India, of adopting a sister's or daughter's son is valid.¹ The Court observed : "Among Sudras the adoption of daughters' and sisters' sons has always obtained, and whether the Brahmans who settled in the south of India never recognized that such adoptions were prohibited in their case or whether they adopted the practice which they found prevalent among the people of the country in which they settled, we are satisfied that the practice of making such adoptions has prevailed among Brahmans in what are now the Southern districts of this Presidency from time immemorial."² Similarly by the custom of Malabar the adoption of a sister's son among the Nambudri Brahmans is held to be sanctioned by the customary law of Malabar by a Full Bench of the Madras High Court.³ In *Minakshi v. Ramanada*,⁴ which is also a Full Bench case, the Court observed : "Another objection is that, according to this rule, the adoption of a daughter's son, of a sister's son, and of a brother is not permitted, whilst according to usage it is permitted. In the case of the two former, the special usage is referable to the ancient law of *Putrika Putra*; and in the case of a brother if a special usage is proved, it may be referable to the ancient practice of regarding the eldest brother as a father. On this point, however, we do not consider it necessary to express any opinion in the absence of evidence as to usage. But these special cases do not seem to us to negative the applicability of the rule under consideration as a general rule."

Adoption of a son of the paternal uncle was held valid.⁵
Adoption of a nephew was held to be legal if performed

¹ A decision to the contrary by Halloway J., in *Narasammal v. Balarama Charlu*, 1 Mad. H.C.R. 420 (1863) was based on a misconception of the force of custom. See *Supra*.

² 9 Mad. p. 53,

³ *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri*, 7 Mad. 3 (F.B.) [1883].

⁴ 11 Mad. 49 p. 55. (F.B.) [1886].

⁵ *Virayya v. Hanumanta*, 14 Mad. 459 (1890).

by word of mouth alone.¹ In Kashmere the general principle amongst the Hindus is to adopt their younger brother.² The son of a wife's brother may be adopted.³ Similarly the adoption of the son of a maternal aunt's daughter is not invalid.⁴

Amongst the *Bohra* Brahmins of the Northern districts of the North-Western Provinces there exists a valid and legal custom in virtue of which a person of that caste can adopt his sister's son.⁵ Their Lordships referring to the Madras Full Bench cases observed : "The validity of such a custom by which a sister's son may be adopted amongst Nambudri Brahmins in Malabar, and of a similar custom by which a daughter's son may be adopted amongst the Brahmins of Tanjore, Trichinopoly and Tinnevelly have been judicially recognized by Full Benches of the Madras High Court. The validity of a custom by which amongst certain tribes of Brahmins in the Punjab, a sister's son or a daughter's son may be adopted has been judicially recognized by the Chief Court of the Punjab. (Sarkar's Tagore Law Lec. : 1888 pp. 311-342.) That generally accepted rule of the Hindu law, which prohibits amongst the twice-born classes the adoption of a sister's or daughter's son, has been in many parts of India controlled and varied by custom or possibly never followed, may be gathered from the cases collected in the notes to paragraph 124 pages 137 and 138 Mayne's H.L. 4th Edn."

In Bombay it is a general rule amongst Brahmins, Kshatriyas and Vaishyas, that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not marry

Amongst
Bohra
Brahmins in
the N.W.P.

¹ *Huebut Rao Mankur v. Govind-rao Bulwant Rao Mankur* 2 Bom. 88 p. 95 (1821). 15 (1881).
² *Venkata v. Subhadra*, 7 Mad. 548 (1883).

³ *Vide Golapchandra Sastri's Tagore Lec.* (1888) p. 318. ⁴ *Chain Sukh Ram v. Parbati*, 14 All. 53 p. 57. (1891).

⁵ *Sriramulu v. Ramayya*, 3 Mad.

In Bombay.

by reason of propinquity. The burden of proving special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom.¹

Adoption of
an only son
or eldest son.

An adoption of an only son is prohibited by the Shastras, and so is the adoption of an eldest son. But both in Madras and Allahabad such adoption is valid.² In a Calcutta case it was urged that an adoption of an eldest son was not legal inasmuch as he was an elder son and could not be legally adopted. The Court, however, said that there was no evidence to show that the adoptee was the eldest son of the family at the time of his adoption, and precedents showed that the adoption of an elder son though improper, was nevertheless not illegal.³ The Bombay High Court held the same view, i.e., the adoption of an only son though improper was not invalid if made.⁴ But since 1868 both the Calcutta and Bombay High Courts have held that such adoption is invalid and that even the doctrine of *factum valet* cannot be extended to such cases of adoption.⁵ This view has been approved of by the Bombay High Court in several cases⁶ and a Full

¹ *Gopal Narhar Sifray v. Hanuman Ganesh Sifray*, 3 Bom. 273 (1879).

² *Chinut Gauudan v. Kumara Gauudan*, 1 Mad. H.C.R. 54 (1862); s. c. 1 Ind. Jur. 115; *Hannman Tewari v. Chirai*, 2 All. 164 (F.B.) [1879] Turner J., dissenting. But See *Tulshi Ram v. Behari Lal*, 12 All. 328 (F.B.) [1889].

³ *Sertram v. Dhunrook Dharee Sahye*, 1 Hay 260 (1862). See also *Jogmonee, Dasree v. Siboo Sundary Dasree*, Fulton 75 (1861).

⁴ *Mhalsubai v. Vithoba Khan-*

dappa, 7 Bom. H. C. R. App. 26 (1862); *Raja Vyankatram Anandrao Nimbalkar v. Jagarartrar*, 4 Bom. H. C. R. A. C. J. 191 (1867).

⁵ *Raja Upendra Lall Ray v. Rani Prasanna Mayi*, 1 B.L.R. A.C. 221 (1868); s. c. 10 W.R. 347.

⁶ *Bhaskar Trimba Acharya v. Mahader Ramji*, 6 Bom. H. C. R. O. C. J. 1; *Lakshmappa v. Ramara*, 12 Bom. H.C.R. 364; *Rangubai v. Bhagirathibai*, 2 Bom. 377 p. 379; *Sumasakhara v. Subhadrumaji*, 6 Bom. 524; *Kushibai v. Tutia*, 7 Bom. 221.

Bench has laid down that the adoption of an only son is absolutely invalid.¹

As to whether a father having only two sons could properly give them both away in adoption it was held that the adoption would not be invalid though the sin would be not with the person receiving in adoption but with the father in thus giving away both of his sons and leaving himself childless.²

In *Cali Chunder Chowdhury v. Shib Chunder Bhudoory*³ *Paluk Putra.* it was urged that a *paluk-putra* is a good and valid adoption amongst Sudras according to Hindu law. The Court held that there is but one form of adoption recognized by Hindu law books for the Bengal Provinces and there is *quoad* that no distinction is made between different castes.⁴

As there must be a giving as well as receiving to constitute a valid adoption, an orphan cannot be adopted.⁵

Among Ooriya Rajahs and Zemindars of Ganjam, who are Kshatriyas, the exequial rites are always performed by a Brahman official, who is permanently attached to the family and who is styled a "pro-son-Brahman."⁶

Besides *Dattaka*, *Dwymushayana*, and *Kritima*, a fourth species of subsidiary son, *viz.*, *Kritaka*, may be mentioned. A question arose in 1812 as to the competency of adoption by *purchase*. It was said that that form of adoption was sanctioned by usage in Southern India. But at the trial no sufficient evidence was produced to establish it. The question was not determined as the case was compromised. But the authorities both in Northern and Southern India

Adoption of
an orphan.

"Pro-son-
Brahman."

Kritaka son.

¹ *Waman Raghupati Bach v. Krishnaji Krishnaji Bach*, 14 Bom. 219 (F. B.) [1880].

² *Huebut Rao Mankur v. Gorakhr Rao* 2 Borr. 83.

³ 11 *Sevestre* 265 (1870).

⁴ *Bhimana v. Tayappa Mai*. *Decis* 124 (1861).

⁵ *Bal'cantrai Bhaskar v. Bayabai*, 6 Bom. H. C. R. 83 (1869); *Subbalurummal v. Immakutti Ammal*, 2 Mad. H. C. R. 129 (1861).

⁶ See Mayne's H. L. p. 107, *Lakshminarayana Dasit*, II Mad. 288 (1887).

seemed to agree that the *Kritaka* form was obsolete in the present age.¹

Appointment
of a daughter
(*Putrika
putra*).

The custom by which a Hindu father, in default of male issue, might appoint a daughter to be as a son or appoint her to raise a son for him is now obsolete.² The question came up before the Judicial Committee in *Thakoor Jeebnath Sing v. The Court of Wards*.³ Their Lordships observed : "This appointment of a daughter may not be strictly an adoption but the text writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. The custom is referred to in the case of *Nursing Nurain v. Bhullen Lall*.⁴ But supposing it exists, inasmuch as it breaks in upon the general rules of succession, wherever an heir claims to succeed by virtue of that rule he must bring himself very clearly within it." In this case, (according to their Lordships finding) there seems to be no sufficient authority for holding that a father may delegate the power to appoint. The rules as to the manner of appointment given in the old authorities point to the act of appointment proceeding personally from the father and there is nothing said about the father's power to delegate the appointment to his sons. In this instance the appointment was not made by the father.⁵

Rights and
Privileges of
adopted son.

Since an adopted son becomes for all purposes the son of the adoptive father, his rights and privileges, as to inheritance from his adoptive parents and their relations,

¹ Strange's *Hindu Law*, Vol. II p. 140 *et seq.*

Laws, Adoption.

² 2 I. A. 163 (1875) : s. c. 15

³ *Vide* Sir Thomas Strange's *Hindu Law*, vol. I 188. Sir Wm. Macnaghten *Treatise on Hindu*

B.L.R. 190 : s.c. 25 W.R. 409.

⁴ W. R. 194 (1864).

⁵ See Malabar Customs *Illatum*.

are precisely the same as that of a legitimate natural born son. He succeeds not only lineally but collaterally to the inheritance of his relations by adoption.¹ In *Teencowree Chatterjee v. Denonath Banerjee*² the Court has held that a son adopted by one wife becomes the son of all, and succeeds to their *Stridhan*, in the absence of daughters, just as a natural born son will do. A Full Bench of the Calcutta High Court has laid down that an adopted son is entitled to inherit from his adoptive mother's relations in the same way as a son of her body. This ruling has been affirmed by the Judicial Committee on appeal.³

An adopted son, (except a *dwyamushyayana* who may inherit in both natural and adoptive families) loses all rights of inheritance in his natural family; but in the adoptive family where by virtue of adoption he is appointed as heir, his right is permanent and absolute. An adoptive father cannot deprive his adopted son of his rights according to his pleasure or caprice by alienating the estate by an act *inter vivos* or by will to the detriment of the adopted son.

In the well-known case in which Rajah Nabkissen gave by will the principal part of his property to his son born after adoption and deprived his adopted son of his legitimate share, the Supreme Court after consulting all the principal Pundits held that Rajah Nabkissen, after having

¹ See the following cases :—

Sumbhoo Chundra Chowdhry v. Narain Dibeh 3 Knapp 55 (1835) : 1 W. R. 25 (P.C.) ; *Lukhee Nath Ray v. Shamasoondree Beng.* S.D. Decis. (1858) p. 1863 ; *Kishen Nath Ray v. Hurree Govind Ray Beng.* S.D. Decis. (1859) p. 18 ; *Gooroo Pershad Bose v. Rashbehari Bose Beng.* S. D. Decis. 411 (1860) ; *Taramohun Bhattacharjee v. Kripa Mayee Dabia*.⁵ Wyman 251 (1868) ; *Puddo Kumaree*

Debec v. Juggut Kishore Acharjee 5 Cal. 615 (1879) ; *Puddo Kumari Debi Chowdhurani v. The Court of Wards*, 8 I. A. 229 (1881.) : s.c. 8 Cal. 302.

² 3 W.R. 49 (1865).

³ *Uma Sankar Moitro v. Kali Kamal Majumdar*, 6 Cal. 256 (F.B.) (1880) : s. c. 7 C. L.R. 145 : s. c. in J. C. 10 I.A. 138 (1883) : s. c. 19 Cal. 232 : s. c. 13 C.L.R. 379. See *Sham Kuwar v. Gaya Din*, 1 All. 255 (1876).

adopted Gopymohan Deb as a son, could not devise away his share of the estate from him, and therefore Gopymohan recovered from the Rajah Rajkissen (son born after adoption) the half of the property. Macnaghten J., observed with reference to this point that an adopted son was considered in the nature of a *purchaser for a valuable consideration* as he thereby lost his inheritance in his own natural family out of whom he was adopted.¹

In *Sudannul Mahapatir v. Bonomalee*² which came from Cuttack, and in which the adoptive father took a second son in adoption in the life-time of the first and by a will settled the hereditary property upon the second adopted son and disinherited the first son, the Court held that the father could not so deprive the first son of all his rights.

The rule that an adopted son loses all rights in his natural family holds good only *qua* natural son. No doubt he ceases to be a member of his natural father's family but retains his consanguinal *sapind* relationship to the family of his birth. He cannot therefore after adoption marry any damsel in his natural family whom he could not have married before adoption.³ Nor can he adopt any one from his natural family, whom he could not have adopted, had he remained in the family.⁴

Adoption in Bareilly.

Two kinds of adoption are prevalent in Bareilly viz., the *Kevola* and the *Dwiyamushyayana*. By the first the adopted son becomes the son of the adopted father only and thus becomes unqualified to offer oblations to the manes of his natural parents, or to share in their property ; and that if any person bestows his only son under this form of

¹ This case was decided about the year 1800 or 1801 and referred to in *Hencouer Bye v. Hencouer Bye*

² Morley's Dig. 133 (1818). See also Macnaghten's *Considerations on Hindu Law*, pp. 228-230.

³ 1 Marshal 317 (1883).

⁴ See Dattaka Mimansa VI § 10. Dattaka Chandrika IV § 8.

⁵ *Moottia Moodally v. Uppon Mad.* Decis p. 117 (1858).

adoption it would not be recognized by the *Shastras*, but under the *Dwyamushyayana* form the adopted child remained the child of his natural as well as his adopting parents; and that an adoption of an eldest son or only son, in this form, would be permitted by the *Shastras*.¹ In considering the question viz., whether an adoption by a widow after her husband's death without any authority from him is valid in the zillah of Etawa, the Court observed : "According to the native text-writers it seems to be clear that the ancient law of Hindoostan required the authority of the husband ; but it is also clear that the strictness of that law has been, in many districts, relaxed or modified by local usage ; and the opinion of the *Shastris*, as published in Mr. Borrodaile's *Bombay Reports*, is very strong to show that in the Marhatta States, to the West of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not in their Lordship's judgment established ; on the contrary, the weight of authority is in favour of the opposite conclusion ; the opinion of the Pundits of the Sudder Court, both in this case and in the case of Shumshere Mull (Appendix 83) and that of the Pundit of the Provincial Court of Appeal of Benares in the latter, appearing to be entitled to more credit than those of the Pundits of the zillah and Provincial Courts of Etawah and Bareilly and of the City Court of Benares."²

¹ *Rajah Haimun Chull Sing v. 203 at p. 206 (1834).*
Kumer Gunesham Sing, 2 Knapp ² *Ibid p. 266.*

CHAPTER V. HINDU CUSTOMS.

IMPARTIBILITY.

The general rule among Hindus is that an estate is divisible among the heirs of the holder on his death; but an imitable estate is an exception to the rule.¹ It is by nature indivisible and capable of enjoyment by only one member of the family at a time. Either by special law or custom, it always devolves entire to one heir. A Raj, a Principality, a State, or an ancient extensive zemindari may be mentioned as instances of imitable estates.

The reason why such estates are imitable seems to be because of the vastness of their area, the impracticability of their division and sub-division, ultimately tending to the extinction of the whole estate; and partly, also, to the fiscal inconvenience that would arise by the process of sub-division. However, whatever may be the reasons for such estates being imitable, a uniform practice and a settled custom have arisen which make them indivisible and put them beyond the ordinary rule of law. It should be noted that there is no presumption of imitatibility because an estate is large. The custom of imitatibility should be proved in every case.

Primogeniture is the rule of descent of these imitable estates. The eldest son takes the whole estate, subject only to a charge of maintenance, sometimes called *Babooana*, of the junior members of the family. These junior members are allowed a certain sum of money out of the revenues, and in some cases, lands yielding a certain income, by the

¹ *The Secretary of State in Council of India v. Kamachee Singh*, 6 Moo. I. A. 164 p. 187 *Boye Sahiba*, 7 Moo. I. A. 476 (1855), p. 487 (1859); *Baboo Ganesh*

ruler or holder of the estate for the time being. Such allowances correspond to appanages to younger members of powerful European families.

The customary rights to succession to such impalitable estates seem to have been the subject of a Regulation in 1793, *viz.*, Regulation XI of 1793, which provided that in the case of intestacy, notwithstanding such custom of primogeniture, these estates would devolve (when there is more than one heir) on all the heirs of the deceased holder, each heir succeeding to his respective share. This Regulation came into operation on the 1st of July, 1794.¹ Then, by a further Regulation, *viz.*, Regulation X of 1800, it was declared that the Regulation XI of 1793 would not operate in the *Jungle Mahals* of Midnapore and other districts and subsequently by Sec. 36 of Regulation XII of 1805, estates or *Mahals* in Cuttack were declared to retain their established usage of devolution to a single heir.

In considering the question of impalitability as prevailing in India, we cannot pass over certain tenures where impalitability equally prevails. They, as a rule, go under the name of Service Tenures. Before the advent of the English, Military tenures were very common. The powerful chiefs, as in Europe so in India, held lands of the paramount power on the condition of attending the sovereign with a number of soldiers or a body of horsemen, whenever called upon to do so. Lands were also given to persons who were to hold certain mountainous passes to prevent the passage of enemies or wild elephants.

¹ Sec. 2, Reg. XI. 1793 runs thus :—"After the 1st of July, 1794, if any *Zemindar*, independent *Talookdar*, or other actual proprietor of land, shall die without a Will, or without having declared by a writing, or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and

shall leave two or more heirs, who, by the Mahomedan or Hindu law, (according as the parties may be of the former or latter persuasion), may be respectively entitled to succeed to a portion of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled."

These tenures are called *Ghatwali*. They exist even to this day. Watchmen got lands instead of money to perform the duties of policemen in villages. Such tenures are known as *Chowkidaris* in Bengal, *Vatans* in Bombay and *Karnams* in Madras. These Chowkidari tenures or Chakran lands are gradually being resumed and the village Chowkidars are paid a salary. Besides these, we may mention *Jagirs* or *Saranjams*, as they are called in Bombay. Jagirs are estates given by the sovereign power to individuals for meritorious services. All such tenures bear the character of imparibility and descend to the person who discharges the services. In Madras there is a class of imparible estates known as *Polliams*. These as well as *Inam* lands and lands dedicated to "Mutts" and Temples are properly included under imparible estates. The mode of descent of this class of lands will be treated in the next chapter under "Religious Endowments".

From old records of decided cases we find that most of the Rajes and Principalities were subjects of frequent and renewed litigation, in some cases litigation lasting over a period of sixty years, and coming up before the Judicial Committee about half a dozen times before final decision. Among others we may mention the following Rajes as of considerable importance:—

Tipperah Raj.¹

Tirhoot Raj.²

Bettiah Raj.³

Hunsapore or Hatwa Raj.⁴

¹ *Ramgunga Deo v. Durga Munee Jobraj* 1 S.D. Sel. Rep. 270 (1809); *Neelkista Deb Burmonoo v. Beer-chunder Thakoor* 12 Moo. I. A. 523 (1869) and other cases.

² *Maharaj Koncur Basdeo Singh v. Maharajah Roodur Singh Bahadoor* 7 S. D. Sel. Rep. 271 (1846); *Baboo Gunesh Dutt*

Singh v. Maharaja Maheshur Singh 6 Moo. I.A. 164 (1855).

³ *Ram Nundun Singh v. Maharanee Janaki Koer* 29 Cal. 828 (P. C.) (1902); s. c. 7 C. W. N. 57.

⁴ *Baboo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee* 12 Moo. I.A. 1 (1867).

Manbhoom Estate.¹

Soosung Estate.²

Shivagunga Zemindari.³

Pachet Raj.⁴

Pactum Raj (in Chota Nagpur).⁵

Bhara Raj.⁶

Ramghur Raj in Chota Nagpur.⁷

Seohur Raj (in Tirhoot).⁸

Pittapur Raj (in the Godaveri District).⁹

Tanjore Raj.¹⁰

Totapalli Estate (in Rajamundry).¹¹

Devarakota Estate.¹²

Vallur Zemindari.¹³

Tank.¹⁴

¹ *Rajah Rughoonath Singh v. Rajah Hurrehur Singh* 7 S. D. Sel. Rep. 146. (1843).

² *Ranee Hursundree Dibbea v. Rajah Bishen Nath Singh* 3 S. D. Decis. 339 (1847).

³ *Katama Natchiar v. The Raja of Shivagunga* 9 Moo. I. A. 539 (1863) and several other cases. The latest being *Muttucaduganudha Terar v. Periasami alias Udayana Terar* 23 I. A. 128 (1896).

⁴ *Anund Lal Singh Deo v. Maharaja Dhiraj Gurrood Narayan Deo, Bahadur* 5 Moo. I. A. 82 (1850); *Nilmoney Singh Deo v. Hingoo Lall Singh Deo* 5 Cal. 256 (1879).

⁵ *Rajah Udaya Aditya Deb v. Jadub Lall Aditya Deb* 8 I. A. 248 (1881); s. c. 8 Cal. 199.

⁶ *Raja Rup Singh v. Rani Baiuni and the Collector of Etawah* 11 I. A. 149 (1884).

⁷ *Maharanee Heeranauth Kooercee v. Baboo Burm Narain Singh* 15 W. R. (1871); *Maharani*

Hiranath Koer v. Baboo Ram Narayan Singh 9 B. L. R. 274 (1873).

⁸ *The Collector of Wards v. Rajkumar Deo Nundun Singh* 9 B.L.R. 310n (1871).

⁹ *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards* 26 I.A. 83 (1899); 22 Mad. 383; 3 C.W.N. 415.

¹⁰ *The East India Co. v. Kamachee Boye Sahiba* 7 Moo. I. A. 476 (1859); 4 W.R. (P.C.) 42.

¹¹ *Sri Rajah Yenumulla Garuvi-deamma Garu v. Sri Rajah Yenumulla Ramandora Garu* 6 Mad. H.C.R. 93 (1870).

¹² *Srimantu Raja Varlagadda Malikarjuna v. Srimantu Raja Varlagadda Durga* 17 I.A. 131 (1890).

¹³ *Venkata Narasimha Naidu v. Bhashyakarlu Naidu* 22 Mad. 538 (1899).

¹⁴ *Mohammad Afzal Khan v. Ghulam Karim Khan* 30 Cal. 843 (P. C.) [1903].

Zemindari in Bhagulpore.¹

Patia Raj (in Cuttack).²

Normal state
of Hindu
family is
joint.

The normal state of every Hindu family is joint, and where there is no proof of division, the presumption is that the family is joint in food, worship and estate.³ An imitable estate is, according to Hindu law, a joint family property and not a separate property, unless a custom to the contrary is shown.⁴ An ancestral estate, even though imitable, is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint.⁵ The imitability of property does not *per se* destroy its nature as joint family property or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon the death of the former in preference to those who would be his heirs if the property were separate.⁶ "The rule upon this subject" observed their Lordships "was stated in the *Shivagunga case*.⁷" It is there said: 'The Zemindari is admitted to be in the nature of a principality—imitable and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now

¹ *Musst. Maharani v. Beni Pershad Rai* 4 S.D. Sel. Rep. 62 (79) [1825].

² *Gopal Prasad Bhakat v. Rajah Debbya Singh Deb* 9 C. W. N. 330 (1904).

³ *Neelkiste Deb Burmono v. Bevr Chunder Thakur*, 12 Moo. I.A. 523 (1869).

⁴ *Bhawani Ghulam v. Deoraj Kuari* 5 All. 542 (1883). See also *Katama Natchier v. Rajah Moottoo Vijaya* 9 Moo. I.A. 539 (1863); *Ramalakshmi Ammal v. Sica-nantha Perumal Sethurayar*, 14 Moo. I.A. 570 (1872); *Doorga*

Persad Singh v. Doorga Konwari 4 Cal. 190 (1878); *Rajah Yanumula Venkayamah v. Rajah Yanumula Boochia Vankondora* 13 Moo. I.A. 333 (1870); *Periasami v. Periasami* 5 I.A. 61 (1878).

⁵ *Rajah Rup Singh v. Rani Baini and the Collector of Etawah* 11 I. A. 149 (1884); s.c. 7 All. 1; *Chowdhry Chintamun Singh v. Musst. Nowlukho Konwari* 2 I.A. 263 (1875).

⁶ *Doorga Persad Singh v. Doorga Konwari* 4 Cal. 190 (P.C.) [1878].

⁷ 9 Moo. I.A. 588.

admitted to be that of general Hindu law prevalent in that part of India, with such qualifications only as flow from the imitable character of the subject. Hence, if the Zemindar, at the time of his death, and his nephews, were members of an undivided Hindu family, and the Zemindari, though imitable, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the Zemindar at the time of his death was separate in estate from his brother's family, the Zemindari ought to have passed to one of his widows and, failing his widows, to a daughter or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but Gouri Vallabha Taver's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is, that even if the last zemindar continued to be generally undivided in estate with his brother's family, this zemindari was his self-acquired and separate property'.¹ The same rule was laid down by their Lordships in the case of *Periasami v. Periasami*.²

Impartibility of a Raj does not render it inalienable as a matter of law. Its inalienability depends upon family custom which must be proved.³ Or in other words, inalienability, like impartibility, is a special independent incident which lies outside the ordinary Hindu law and can only attach to an imitable estate by family custom and cannot be deduced from a theory of dormant co-ownership.⁴ Alienation by the proprietor of an imitable

Inalienability of an
Imitable estate.

¹ *Doorga Persad Singh v. Doorga Konwari*, 4 Cal. 201.

² 5 I.A. 61 (1878); s.c. 1 Mad. 312.

³ Vide *Pectum Raj* case; *Rajah Udaya Aditya Deb v. Jadab Lal Aditya Deb* 8 I.A. 248 (1881); s.c. 8 Cal. 199 (P.C.); s. c. in Cal. II, C. 5 Cal. 113; 4 Shome Notes

11 (1879). See *Anund Lall Singh v. Maharaja Govind Narain Deo* 5 Moo. I.A. 82 (1850).

⁴ *Sivasubramania v. Krishnamal* 18 Man. 287 (1894); *Nirpal Singh v. Jai Singh* 23 I.A. 137 (1896); s.c. 19 All. 1.

Raj, which is inalienable by custom is valid if made for legal necessity ; and his successor who takes the Raj by right of survivorship is, under the Mitakshara law, liable for the debts proved to have been contracted for legal necessity.¹

Where, by virtue of a custom, an ancestral immoveable property is not partible among the members of a joint family governed by the Mitakshara, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity.²

*Rani Sartaj
Kuari's case.*

In *Rani Sartaj Kuari's* case, the point for determination was whether a gift of certain villages by the Rajah in favour of his younger wife, without the consent of his son, was valid. The villages in question were a part of the ancestral Raj, which was governed by the Mitakshara law in all other respects, except that, by custom, it was impartible, and descendible to a single heir by the rule of primogeniture. The Judicial Committee held that in order to render the Rajah's gift invalid, as made without the consent of his son, it must be shewn that the Rajah's power of alienation was excluded by the custom or by the nature of the tenure. Their Lordships said that "the eldest son, where the Mitakshara law prevails, and there is the custom of primogeniture, does not become a co-sharer with his father in the estate ; the inalienability of the estate depends upon custom which must be proved, or it may be in some cases upon the nature of the tenure."³

In the same case the Judicial Committee made certain observations, with reference to the nature of the evidence

¹ *Gopal Prasad Bhakat v. Itaghunath Deb* 32 Cal. 158 (P.C.) [1904].

² *Rajah Ram Narain Singh Pertum Singh* 11 B.J.R. 397 : s.c. 20 W.R. 189 (1873).

³ Per Sir Richard Couch in *Rani Sartaj Kuari v. Rani Deoraj* 15 I.A. 51 p. 65 (1887) ; s.c. 10 All. 272 ; see also 18 B.L.R. 445 which was followed in the above case.

necessary to prove a custom of inalienability, which should be noticed. Their Lordships said: "The fact that there is no evidence of a sale of any portion of the estate is in the Plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as a proof of a custom of inalienability."¹ Where the custom of inalienability is established, any alienation by the holder of an imitable estate will be regarded as invalid.²

The principle laid down in *Rani Sartaj Kuari's* case has been followed in other provinces, and this case has become the leading case on the subject. In pursuance of this ruling the Allahabad High Court in a later case³ has held that if amongst Hindus, governed by the law of the Mitakshara, a Raj happens to be imitable and governed by the rule of primogeniture, it does not therefore follow that it is inalienable. The condition of inalienability depends upon special custom or, in some cases, upon the special tenure of the Raj, and must be clearly proved.

Prior to the year 1889, and as far back as 1822, a series of decisions established a custom of inalienability of imitable estates in the Madras Presidency. But a departure from these old decisions was first made in the case of *Beresford v. Ramasubba*.⁴ In this case the holder of an imitable zemindari, governed by the law of primogeniture, and having a son executed a mining lease of the part of the zemindari for a period of twenty years. The Madras High Court following the *Sartaj Kuari's* case, held that the lease was not invalid as against the grantor's minor son, and the person to whom the Court of Wards granted certain mining rights on the same land. The learned

Sartaj Kuari
followed in
the Madras
Presidency.

¹ 15 I. A. 66.

² *Rup Singh v. Pirbhu Narain*

³ *Sivasubramania Naicker v. Krishnammal* 18 Mad. 287 (1894).

⁴ 20 All. 537 (1898).

⁵ 13 Mad. 197 (1889).

Judges said they were bound by the decision of the Privy Council and overruled the old decisions, which were based "upon the construction of Regulation XXV of 1802 and, afterwards upon the rights of the members of an undivided family under the Mitakshara law." The Privy Council in a very recent case¹ has finally settled the point, holding that an imitable zemindari is not inalienable by Will or otherwise by virtue only of its imitability, and in the absence of proof of some special family custom or tenure attaching to the zemindari and having that effect. It was contended before their Lordships that *Sartaj Kuari's* case was not binding in the Madras Presidency and that a long course of decisions had established a custom of inalienability. The Judicial Committee examined a number of cases and after carefully considering them held that the ruling in *Sartaj Kuari* was applicable to the zemindaris in the Presidency of Madras.

In *Venkata Narsimha Naidu v. Bhashyakarlu Naidu*² the Madras High Court, following the Judicial Committee's decision in the above case, has laid down that the sons of the present holder of an imitable estate have no *locus standi* to question the acts of their father.

In provinces where the Bengal school prevails, a holder of an ancestral imitable estate with descent by the rule of primogeniture can, without the consent of his sons, sell, give or pledge the estate, and, by Will, prevent, alter or affect their succession to such property.

Rule of succession to an
Imitable estate.

Where the imitability of a Raj had its origin, not in any custom, family or local, but in the peculiar character of the Raj itself, and which by its very nature was indivisible, the nature of the Raj would not exclude from inheritance any persons of either sex, if without physical

¹ *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards* 26 I. A. 83 (1899) : s.c. 22 Mad. 383 : s. c. 3 C. W. N. 415. ² 22 Mad. 538 (1899).

or intellectual infirmity.¹ But where the right of succession to a Raj depends upon the custom which regulates the devolution of the Raj, the true question as between rival claimants is: Which of them is favoured by the custom as known to the public functionaries of the district, as recognized by the family itself of the late Rajah and as established by precedents?²

On the question as to the extent to which property of the nature of an imitable Raj is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely, it has been held that such a usage does not interfere with the general rules of succession further than to vest the possession and the enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not severed any more than by the succession of coparceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of others who would be coparceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of co-parcenary shares.³

The sound rule to lay down with respect to undivided or imitable ancestral property is, that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the law of partition, are co-heirs, irrespectively of their

¹ *Maharance Heeranauth Koon-
erjee v. Baboo Burne Narain Singh*
15 W. R. 375 (1871) per Markby
J.

² *Sri Rajah Venumula Garari-
deamma Garu v. Sri Rajah Ve-
numula Banandora Garu* 6 Mad.
H. C. R. 93 (1870).

³ *Ibid.*

degrees of agnate relationship to each other, and that on the death of one of them leaving a widow and no near "Sapindas" in the male line, the family heritage both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was the last sovereign, the widow's position as heir, relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property.¹

The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it.² In determining the right of succession to an imitable estate the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or *Kulachar* discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to imitable estate by analogy to general Hindu law.³ When an imitable property, governed by the Mitakshara, passes by survivorship from one line to another, it devolves not necessarily on the coparcener nearest in blood but on the nearer coparcener of the senior line.⁴ When an estate is imitable, it is enjoyed in a different mode from that prescribed by the ordinary Hindu law; but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of imitability.⁵

¹ *Ibid.*

² *Srimantu Raja Varlagadda Malikajuna v. Srimantu Raja Varlagadda Durga* 17 I. A. 134 (1890).

³ *Subramanya Pandya Chokka Talatur v. Sica Subramanya Pilla* 17 Mad. 316 (1894).

⁴ *Kachi Yura Rangappa Kolokka Thola Udayar v. Kachi Kalyana Rangappa Kallaka Thola Udayar* 24 Mad. 562 (1901).

⁵ *Mutturaduganadha Terar v. Periaswami* 28 I. A. 128 p. 137 (1896).

Where, by the usage of the country and family of parties claiming certain prerogatives and property, it was customary that such should vest in the senior male of a particular branch of the family, the court held that a testamentary disposition in favour of any other member of the family was void and of no effect.¹ Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion.²

The right of the eldest among the males to inherit real estate or dignity is called *Primogeniture*. This right was not acknowledged by the Romans among whom sons and daughters all shared equally the property of their parents. In continental countries it exists in a modified form only, if at all.³ Amongst Hindus in India succession in consequence of primogeniture seems to be the rule only in the case of large zemindaris and estates which partake of the nature of principalities.⁴ By the ancient custom of the family an impartible zemindari may descend to the eldest son only, other sons getting maintenance for life.⁵ An estate may not be a *Raj* nor a *Polliam*, yet a custom of

Primo-
ture.

¹ *Malosherry Kowilagom Rama Wurma Rajah v. Mothorakal Kowilagom Rama Wurma Rajah* 1 Mad. Decis 509 (1825).

² *Mallikarjuna Prasad Naidu v. Durga Prasada Naidu* 17 Mad. 362 (1893).

³ *Eyre and Lloyds' Rights of Primogeniture and Succession*.

⁴ *Garuradhwaja Prasad v. Superundhwaja Prasad* 23 All. 37 P.C. (1906); *Bhنجгар v. Malojirar* 5 Bom. H. C. R. 161 (1868). *Bhowani Ghulam v. Deo Raj Kuari* 5 All. 542 (1883); s.c. in P.C. 15 I. A. 51 (1887); s. c. 10 All. 272;

Katma Natchier v. Rajuk Mottoo Vijaya Raganadha Bodha 9 Moo. I. A. 539 (1883); *Ramalakshmi Ammal v. Sivanantha* 11 Moo. I.A. 579 (1872); *Rajah Yanumula Vinkayamh v. Rajah Y. B. Vankundura* 13 Moo. I.A. 333 (1870); *Periasami v. Periasami* 5 I.A. 61 (1878); *Thakoor Ishri Singh v. Baldeo Singh* 11 I. A. 135 p. 115 (1884).

⁵ *Lall Muneec Koowaree v. Rajah Nemcenurain* 6 S. D. Sel. Rep. 255 (319) [1839]; *Thakoorai Chuturdharee Singh v. Thakoorai Telakdharee Singh* 6 S. D. Sel.

descent according to the law of primogeniture may exist by *Kulachar* or family custom.¹ But in the case of petty Hindu family a custom of primogeniture i.e. the eldest son alone succeeding to the estate and other sons being entitled to maintenance only, cannot be supported.² The question whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it.³

Lineal primogeniture.

By lineal primogeniture is meant a "continual descent to the eldest member of the eldest branch in exclusion of nearer members of younger branches." Thus, in the event of an eldest son dying before his father, and leaving a son, the latter, surviving his grandfather, shall succeed to the prejudice of the other sons of the Rajah.⁴ The only alternative to lineal primogeniture is primogeniture by proximity of degree and among those who are equal in proximity the elder line is to be preferred.⁵

Rep. 260 (325) [1839]; *Rao Golab Singh v. Rao Oomrao Singh* N.W.P. Decis. 205 (1859); *Anund Lal Singh Deo v. Maharaja Dhiraj Gurrood Narayan Deo Bahadur* 5 Moo. I.A. 83 (1850) : s. c. in the Lower Court 6 S. D. Sel. Rep. 282 (1840); *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* 12 Moo. I. A. 1 (1867); *Baboo Gunesh Dutt Singh v. Maharajah Moheshur Singh* 6 Moo. I. A. 164 (1855); *Nitr Pal Singh v. Jai Pal Singh* 19 All. I (P. C.) [1896].

¹ *Chowdhry Chintamun Singh v. Musst. Nowlukho Konwari* 2 I. A. 263 (1875) : s. c. 1 Cal. 153 : 24 W. R. 253 : s. c. in H. C. 20 W. R. 247; *Rawut Urjun Singh v. Rawut Ghunkiam Singh* 5 Moo. I. A. 169 (1851); *Skyamanand Das Mohapatra v. Rama Kanta*

Das Mahapatra 32 Cal. 6 (1904); *Varlagadda Malikarjuna v. Y. Durga* 17 I. A. 134 (1890); s. c. 13 Mad. 406.

² *Basvantrav Kidingappa v. Mantappa Kiddingappa* 1 Bom. H.C.R. App. 42 (1865).

³ *Srimantu Mallikarjun v. Sri-mantu Durga* 17 I. A. 134 (1890). Followed in *Kachi Kaliyana R. K. J. Udayar v. Kachi Y. R. K. T. Udayar* 28 Mad. 508 (P. C.) [1905] : 10 C.W.N. 95 : s. c. 2 C. L. J. 231.

⁴ *Lall Munnee Koonwari v. Rajah Nemcenarain* 6 S. D. Sel. Rep. 255 (319) [1839]; *Rawut Urjun Singh v. Rawut Ghunkiam Singh* 5 Moo. I. A. 169 (1851); *Meher Chunder Dhal v. Satru-ghan Dhal* 29 I. A. 62 (1901); s. c. 29 Cal. 343 : s. c. 6 C.W.N. 459.

⁵ *Muhammad Imam Ali Khan*

Among others the following may be mentioned as the estates where primogeniture prevails :—Purgunnah Palaoon in Chota Nagpore;¹ Rungpur zemindari;² Purgunnah Raipur in Manbhoom;³ Hatwa;⁴ Bettiah;⁵ Zemindari of Koocheysur in Meerut;⁶ Baswan family of Jats in Alighur;⁷ Dhalbhoom Estate;⁸ Chiefship of Tank in Dera Ismail Khan;⁹ in the district of Cuttack in Orissa;¹⁰ Zemindari of Pachete.¹¹ And the following, where the rule of primogeniture has not been established :—Talook Sunkra in Bhagulpore;¹² Talook Majhouli in Bhagulpur;¹³ Jhajpur in Meerut;¹⁴ Zemindari in Mymensingh.¹⁵

The term *gadinashini* employed in the N. W. Provinces is used in the same sense as primogeniture in Bengal or other

Gadinashini.

v. *Sardar Hussain Khan* 2 C. W. N. 737 s. c. 26 Cal. 90 (P. C. 1898).

¹ *Thakoorai Chutturdharee Singh v. Thakoorai Telukdharee Singh* 6 S. D. Sel. Rep. 260 (325) [1839].

² *Mookund Deb Raikut v. Rance Bissserree* 9 S. D. Decis 159 (1853).

³ *Rajah Raghoonath Singh v. Rajah Hurrikur Singh* 7 S. D. Sel. Rep. 146 (1843).

⁴ Mentioned in 8 Sevestre 291 (1865) re *Rajah Rajkristo Singh*. Primogeniture prevails in Hatwa and Bettiah.

⁵ *Ram Nundan Singh v. Mahurani Janki Koer* 29 I. A. 178 (1902); P. C. 7 C. W. N. 57.

⁶ *Rao Golab Singh v. Rao Oonrao Singh* N. W. P. Decis 205 (1859).

⁷ *Garurudhwaja Parshad Singh v. Saparandhwaja Pershad Singh* 27 I. A. 238 (1900); 23 All. 37 : 5 C.W.N. 33.

⁸ *Mohesh Chunder Dhal v. Satrughan Dhal* 29 I. A. 62 (1901); 29 Cal. 343 : 6 C.W.N. 459.

⁹ *Sardar Muhammad Afzal Khan v. Nawab Ghulam Kasim Khan* 30 I. A. 190 (1903); 30 Cal. 140 : 8 C.W.N. 81.

¹⁰ *Shyamannud Das Mahapatra v. Ramakanta Das Mahapatra* 32 Cal. 6 (1904).

¹¹ *Maharajah Gurunarain Dev v. Anund Lal Singh* 6 S. D. Sel. Rep. 282 (1840).

¹² *Musst. Sheo Soondvere v. Pirthee Singh* 21 W. R. A. 9 (1872).

¹³ *Amrit Nath Chowdhry v. Gouri Nath Chowdhry* 6 B. L. R. 232 (P. C.) [1870].

¹⁴ *Muhammad Ismail Khan v. Fidayat-un-nissa* 3 All. 723 (1881).

¹⁵ *Re Rajah Rajkristo Singh* 8 Sevestre 291 (1865). *Rajkishen Singh v. Ramjoy Burma Mozoomdar* 1 Cal. 136 (P. C.) (1872).

Provinces. Lord Hobhouse said : "The other remark is a suggestion that there is no necessary connection between *gadinashini* and primogeniture. That may be so ; but it is impossible to read the evidence without seeing that the witness on both sides treat the two as identical, or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied *gadinashini* for the purpose of disconnecting it from primogeniture. It is clear that the Subordinate Judge had no suspicion that the evidence applying to *gadinashini* could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny *gadinashini*, they mean to affirm or deny primogeniture ; and their constant identification of the two things show how closely they are connected in the minds of the families of that part of the country. The custom of *gadinashini* has clearly an important bearing on that of primogeniture though the connection between them may not be a necessary one."¹

In another very recent case which made reference to the foregoing case, the Judicial Committee discussed the oral evidence relating to the practice of *gadinashini*. From the statements of witnesses who deposed to the effect that "by *gadinashini* the practice of one person or the eldest son succeeding to the whole estate and the other sons getting maintenance" their Lordships gathered that "expression of this kind shewed the identification in the minds of witnesses of the right of sitting on the *gadi* with succession to the estate."²

Allegation of illegitimacy and rule of primogeniture.

In a claim to inheritance by a younger son in a family in which primogeniture is admitted to be the rule, the Court requires convincing proof of the illegitimacy of the

¹ *Nitr Pal Singh v. Jai Pal*
Singh 23 I. A. 147 (1896) : s. c. 19
All. 1.

² *Garuradhwaja Prasad v. su-*
parundhwaja Prasad 23 All. 87
(P. C.) [1900].

elder brother in order to set him aside. In the absence of such proof, the claim of the younger was rejected.¹

The eldest son who succeeds by virtue of the rule of primogeniture is the son who was born first by any of the wives and not the first born son of the senior or *first married wife*.² In a Madras case the High Court after carefully considering all the authorities and texts on the point held that "as regards the right of sons by different wives to inherit, whether in coparcenary or as sole heir (except perhaps the son of the first wife) the priority in point of time of their mothers' marriages has never been regarded when the wives' were equal in caste and rank, and that the rule of primogeniture was and is the same in the case of sons by several wives of equal caste and rank as in the case of sons by one wife."³

In *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*⁴ the Judicial Committee laid down that the son of a wife married subsequently was entitled to an imitable zemindari in preference to the son of a wife married first, as by Hindu law priority of birth was not affected by the prior marriage with the senior wife. If a party rely upon a special custom of a family to take the succession to the zemindari out of the ordinary Hindu law such custom must be proved to be ancient and continuous.

In a later case the Judicial Committee following the above case held that an elder-born son though of the junior wife is entitled to succeed to the father's estate in preference to the younger-born son of the elder wife.⁵

¹ *Mokund Deb Rakkut v. Ranee Bisnusreee* 9 S. D. Decis. 159 (1853).

litrav Ghorpode 5 Bom. H. C. R. 161 (1868).

² *Rajah Raghunath Singh v. Rajah Hureekur Singh* 7 S. D. Sel. Rep. (126) 146 [1843]. *Rawat Urjun Singh v. Rawat Ghunsiam Singh* 5 Moo. I. A. 169 (1851); *Bhujuangrav bin Darulatrav Ghorpode v. Malojirav bin Dara*.

Siranananja Perumal Sethurayar v. Muttu Ramalinga Sethurayar 3 Mad. H. C. R. 75 (1865).

³ 14 Moo. I. A. 570 (1872); s.c. 12 B. L. R. 396; s.c. 17 W.R. 553.

⁴ *Pedda Ramappa Nayanicaru v. Bangari Seshamma Nayanicaru* 8 I. A. 1 (1880); s. c. 2 Mad. 286,

Priority of birth and not that of the marriage of the mother.

Sometimes by custom, according to priority of marriage and not of birth.

Sometimes again, according to custom, an imitable estate descends to the sons according to priority in order of marriage of their mothers. In a very recent case¹ the Privy Council, agreeing with the concurrent findings of the lower courts, held that the custom was established to the effect that the defendant was entitled to succeed to an imitable estate (in the Madura district) in preference to his half-brother, the plaintiff, by reason of his mother having been married prior to the plaintiff's mother. The plaintiff in this case was senior in age to the defendant, but born of a wife who was married subsequent to the mother of the defendant. Further the mother of the defendant was a daughter of a zemindar, whereas the mother of the plaintiff was a daughter of an ordinary ryot.

Full brother in preference to half brother.

In the last Tipperah case the Privy Council has observed that the rule of "religious obligation and priority marks the brother of the whole blood as preferably heir in succession to the estate of his brother, over the brother of the half-blood only."²

Illegitimate brother's right.

Where a Rajah succeeded to an imitable Raj as the only legitimate son of the last holder and died without leaving any male issue, it was held that his illegitimate brother was entitled to succeed under the Mitakshara by survivorship. This was in the district of Cuttack.³

Exclusion of females.

A female cannot inherit an imitable ancestral estate belonging to a joint Hindu family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed as heirs. This is a rule of law and not dependent on custom. A custom

See *Jagdish Bahadur v. Sheo Pertab Singh* 28 I. A. 100 (1901): s. c. 23 All. 369.

¹ *Sundaralingaswami Kamaya Naik v. Ramaeswami Kamaya Naik* 26 I. A. 55 (1899).

² *Neelkisto Deb Burmono v. Beer*

Chunder Thakoor 12 Moo I. A. 523 p. 541 (1869).

³ *Rajah Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*, 17 I. A. 128 (1890): s. c. 18 Cal. 151.

modifying the law must be a custom to admit females and not a custom to exclude them.¹ The case in which the above proposition was laid down was approved of by the Judicial Committee in *Chowdhury Chintamun Singh v. Musst. Nowlukho Konwari*² and their Lordships in *Rajah Rup Singh v. Rani Baisni*³ said of it that "it was correctly decided and is a binding authority."⁴

These cases no doubt establish that a female cannot inherit an imitable ancestral estate, but there is no inconsistency between a custom of imitatibility and the right of females to inherit an imitable estate. The *Shivagunga* case⁵ has laid down that where an imitable estate is a self-acquired and a separate property of the holder and the latter dies without any male issue, leaving a surviving daughter, the latter succeeds him in preference to his collateral heirs. The Privy Council in the latest *Bettiah Raj* case held that there was not sufficient evidence of a custom to exclude females from inheritance affecting the Bettiah Raj. But their Lordships in considering the evidence on the question whether by the custom of this family females are excluded from inheritance observed thus :—"His (counsel's) argument was that when once you admit a custom, as of imitatibility, you are outside the common law, and it lies upon those, who maintain any particular right, as of females, to take by inheritance, to prove it. The answer to this argument lies on the surface. Where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the

¹ *Maharani Hira Nath Koir v. Baboo Ram Narayan Singh* 9 B.L. R. 274 (1872) : s.c. 17 W.R. 316.

² 2 I.A. 263 p. 270 (1875) ; s.c. 24 W.R. 255.

³ 11 I.A. 149 p. 154 (1884) ; s.c. 7 All. 1.

⁴ See *Musst. Mahamaya Dibea v.*

Gourikant Chowdry 1 S.D. Sel. Rep. 236 (316) [1808] : *The widows of Rajah Zorawur Singh v. Koonwar Pertu Singh* 4.

S.D. Sel. Rep. 57 (1825) ; *Rance Harsundree Dibbea v. Rajah Bishnunath Singh* 3 S.D. Decis. 330 (1847).

⁵ See *Infra* p. 189.

custom.¹¹ There is no inconsistency between a custom of impartibility and the right of females to inherit, as may be illustrated by the well-known *Shiragunga* case and, therefore, the general law must prevail, unless it be proved that the custom extends to the exclusion of females.¹² It may be noted that the Privy Council agreeing with the High Court found that "the present Bettiah Raj must be taken to have been the separate and self-acquired property of Bir Kishore Singh, though with all the incidents of the family tenure of the old estate as an impartible Raj."¹³

Properties purchased by the holder of an impartible estate out of his savings of the estate, would be his self-acquired estates and in the absence of any intention on his part to incorporate them with the ancestral estate, their succession will follow the course of succession prescribed for separate estate.¹⁴

Babooana
allowance.

The term *Babooana* signifies certain allowances granted to the junior members of a family by way of maintenance when the estate or Raj descends to the eldest male heir according to the rule of primogeniture. The grant may be a landed property or some money allowance. Where the grant is a property in lieu of money-maintenance, it is generally subject to the proprietary rights of the grantor and to his ultimate claim as reversioner on the extinction of the grantee's descendants in the male line. The eldest son who succeeds to the *gadi* or Raj assumes the title of Rajah or Maharajah, and the younger male members are called either *Baboos* (as in Behar) or *Thakoors* (as in Tipperah) or *Hakim*, *Konwar*, *Lals* (as in Chota Nagpur) and so forth. Hence it is called *Babooana*. According to the family custom these younger members receive from the reigning Rajah grants for their maintenance. They have no power

¹¹ *Neelkisto Deb Burmono v. [1902] : s. c. 7 C. W. N. 57.*

Beerohunder Thakoor 12 Moo. [Ibid 851.

I. A. 523, p. 512. (1869).

¹² *Srimiti Rani Parbati Kumari*

¹³ *Ram Nundun Singh v. Janki Debi v. Jagadis Chander Dhabal Koer 29 Cal. 828 p. 852 (p. c.) 29 I. A. 82 p. 93 (1901). **

to alienate such grants but to enjoy them as long as they live.¹

The question of the *Babooana* grant by the Maharajah of Durbhunga came up before the Privy Council in several cases.² In *Maharajah Sir Rameshwar Singh Bahadur v. Baboo Jibendar Singh* it was decided that "Babooana" lands are alienable, subject to the proprietary right of the grantor and to his ultimate claim as reversioner on the extinction of the grantee's descendants in the main line. In the last case, (*Ramchunder Marwari v. Madeswar Singh*) it has been further held that a son of the grantee acquires an interest in such a property at his (the grantee's) death.

In a suit for maintenance, the plaintiff, as one of the widows of the late Rajah of Gurh Kishenpershad in Cuttack sued the defendant successor to her husband in the Raj for maintenance by a money-pension according to the usage of the family. The defendant admitted plaintiff's right to maintenance but pleaded that the family pensions were not paid in money but by allotment of land, and that the plaintiff had long been in possession and enjoyment of the same. But as the defendant failed to prove the allotment of lands, a money-pension was decreed to the plaintiff.³

Money pen.
sion by family
usage.

The zemindari of *Shivagunga* is an estate of great value situate in the district of Madura in the Presidency of Madras. The zemindari is said to have been created in the year 1730 by the then Nawab of the Carnatic in favour of one *Shasavarna* on the extinction of whose

Shivagunga
case.

¹ See Tipperah Raj case, Hunsapore Raj case, Tirhoot Raj case, etc, *Supra* under Family Customs.

² *Baboo Ganesha Dutt Singh v. Maharajah Moheshur Singh* 6 Moo. I.A. 164 at pp. 192, 197; *Maharajah Sir Rameshwar Singh Bahadur v. Baboo Jibendar Singh Bahadur*

9 C. W. N. 567 (1905); s. c. 32 Cal. 683 : *Ram Chundra Marwari v. Madeswar Singh* 10 C. W. N. 978 (1906).

³ *Raja Chundersikkhore v. Beebee Bishnuomoloo Dege* 12 S. D. Decis 196 (1856).

lineal descendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nawab, and was granted by the Madras Government to a person called (among his many other names) *Gowery Vallabha Taver*. He had an elder brother, by name *Oya Taver*, who predeceased him, dying in 1815. *Gowery Vallabha*, who married seven wives died on the 19th July, 1829, without male issue but leaving three surviving widows, (of whom two were childless and one was *en ciente* at the time of his death, and afterwards gave birth to a daughter); several daughters by his predeceased wives, a daughter's son and three nephews, sons of his elder brother, *Oya Taver*. Litigation began in the year 1832, i. e., shortly after the death of the *Gowery Vallabha*, among the various members of his family, and for a period of more than sixty years the title to the zemindari of *Shivagunga* was the subject-matter of decisions in various courts.¹ The final decision of the Privy Council in the case was given in the year 1896.

The decision reported in 9 Moo. I. A. 539 (1863) was the earliest case before the Judicial Committee. Therein it was held that the zemindari of *Shivagunga* was in the nature of a Principality, impartible and capable of enjoyment by only one member of the family at a time and that it was the *self-acquired property* of *Gowery Vallabha Taver*, the *Istimirari Zemindar*. That it had devolved, at his death without male issue and upon the subsequent death of his widows, upon his only surviving daughter *Katama Natchiar* in preference to collateral heirs.

¹ *Katama Natchiar v. The Raja of Shiragungah* 9 Moo. I. A. 539 (1863), s. c. 10 Sevestre 172 (a) : s. o. on appeal from S^t D. A. at Madras 7 Sevestre 1121; *Shivayunna Tavar v. Periasumi* 5 I. A. 61 (1878) s. c. 1 Mad. 312 (P. C.) *Periasumi v. Periasumi* 5 I. A. 61 (1878); [In both these cases] and another

appeal a consolidated Judgment was delivered by Sir James W. Colvile] Followed 9 Moo I. A. 539. *Mutta mudugunidhi Tavar v. Periasumi alias Udayana Tavar* 23 I. A. 128 (1886); *Mutta Vuluganidhi Tavar v. Dorasinga Tavar* 8 I. A. 99 (1881).

On *Katama's* death her son claimed to be entitled in preference to D, the son of *Katama's* sister, the eldest daughter of the Istimirari Zemindar. In the litigation which ended in the year 1881 it was established that though the zemindari was imitable, *Katama* took by inheritance a limited estate in her father's property and, on her death, it devolved not on her heir but on the heir of her father.¹

On D's death, *Katama's* son preferred a fresh claim to the zemindari. He maintained that the Istimirari zemindar was still the root of title and that he, being a grandson, was entitled to succeed in preference to D's son who was a great grandson. The defendant (D's son) maintained that D acquired full and complete ownership and became a fresh root of title, so that the property descended to his son. Both the Courts below decided that the defendant's contention was right and the Judicial Committee concurred in the same view.

In *Muttuvaduganadha Terer v. Periasami*² their Lordships have held that an imitable estate, though it is by custom enjoyed in a different mode from that prescribed by the ordinary Hindu law, yet devolves by inheritance according to that law, unless the controlling custom applies specifically to the modes of devolution and not merely to the mode of enjoyment. There is no rule of law applicable to imitable estates that inheritance once obstructed is always obstructed, so that the root of title to an imitable estate is not the last full owner but the last established owner. The reversionary male heir who succeeds at the death of a daughter to the full estate transmits it to his own heir, to the exclusion of those claiming as nearer in succession to the daughter's father.

The principle which the *Shivagunga* case established was, that though, the zemindari was imitable, the daughter took it for the ordinary Hindu woman's estate, and that

Where it does
not constitute
a separate ac-
quired estate

¹ See *Mutta Vaduganadha Terer* (1881).

v. *Dorasing Terer*, 8 I. A. 99 • 23 I. A. 128 (1896).

upon her death it devolved not on her heir, but on the heir of her father.¹ This case was observed upon and distinguished in *Rajah Yanumula Venkayamah v. Rajah Yanumulu Boochia Vankondora*,² in which the subject of litigation was a Mansubdari Taluq held as Mansub, (*i. e.*, on the feudal condition of supplying a certain number of armed peons to the paramount Government,) by a joint Hindu family. By the custom of the family the Taluq was impartible and descendible to a single heir. One of the members of the family took forcible possession of the Taluq and refused to pay the Zemindar's revenue. He was ousted from possession by the Zemindar with the aid of A, another member of the family, whom the Zemindar recognized and put in possession and afterwards entered into an agreement with him to pay the revenue. There was no division of the family. It was held that no forfeiture took place or new title accrued, so as to constitute a separate acquired estate in A.

Hunsapore or
Hatwa Raj.
Effect of
confiscation
and restora-
tion. *Viz-*
major.

We have already referred to the Hunsapore Raj under *Family Customs*, and stated that it is an Impartible Raj and its descent is subject to certain family custom and usage. As a decision of the Privy Council pertaining to this Raj has laid down a very important principle in regard to impartible estates confiscated and restored by Government to the former proprietor or his issue and heir, it is treated as a leading case on the subject. The history of the case is as follows :— In the year 1787, F. the reigning Rajah of Hunsapore, having rebelled against the British Government, was expelled by force of arms and the Raj was confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately, in 1790, granted the Raj to C, a younger member of the family of F, on whom some years afterwards the Government conferred the title of Rajah. Now the question was whether the Raj, under the circum-

¹ See *Mutturaladuganadha Tevar v. Periasami*, 23 I. A. 128 (1896).

² 13 Moo I. A. 333 (1870).

stances had changed its character as an imparible estate. The Judicial Committee held that although the zemindari was to be treated as the self-acquired estate of C, yet, the grant being from the ruling power, it carried, (in the absence of evidence of the intention of the grantors to the contrary) the incidents of the family tenure as a Raj, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation, with no change other than that which affected F and his descendants. It was not the creation of a new tenure but simply a change of tenant by the exercise of a *Vis Major*. Bengal Regulation XI of 1793 does affect the succession by special custom of a single male heir to a Raj, or subject it to the ordinary Hindu law of succession. The Judicial Committee observed thus:—"...There is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the company, had never been broken up. The policy of the Decennial settlement was to form a body of land-holders by ascertaining in whom the zemindari interest in the soil actually was, and making with those persons a permanent settlement of the Government revenue so as to give them greater fixity of tenure.

...In the absence of all evidence to the contrary, it must be presumed, that the settlement was made precisely as it would have been made had the estate continued in the line of Rajah F; and, therefore, that the subject conferred on Ch. was the old zemindari with all its incidents, excepting at most, its descendible quality."¹ As to the effect of restoration this case has been followed by the Judicial Committee in the Bettiah Raj case.²

¹ *Baboo Beer Pertab Sahee v. Sahi Deo v. The Government* 22 W. R. 17 (1874) s. c. 13 B. L. R. 445; *Rajah Yanumula Venkayamah v. Rajah Yanumula Boochia Vankondora* 13 Moo. I. A. 333 (1870); *The East India Co. v. Kamavhee Boye Sakiba* 7 Moo. I. A. 476 (1859); s. c. 4 W. R. (P. C.) 42.

² *Ram Nundun Singh v. Janki Koer* 29 I. A. 178. (1902) : s. c. 29 Cal 828. See *Thakur Kopilnauth*

An Impar-
tible estate
may become
partible.

In the *Nuzvid* case¹ it was held that a zamindari created by *sunnad* in 1803 in accordance with Regulation XXV of 1802 was a partible property. In a recent case² it was held that, with regard to a zemindari granted in 1803, the *onus* was on the Zemindar to prove that his zemindari was imparible. Both these cases have distinguished the *Hunsapore* case. As we have noticed in that case the transaction was not so much *the creation of a new tenure, as the change of the tenant by the exercise of a Vis major*. In the *Nuzvid* case, the zemindari prior to 1802, formed part of an ancient estate which was indivisible and descendible to a single heir, and which was a military *Jagir* held on the tenure of military service and in the nature of a *Raj*. The whole estate was resumed by the British Government for arrears of revenue. In 1802 the zemindari was granted to a person by *sunnad* and became a new zemindari, which, upon the true construction of the *sunnad*, was not imparible or descendible otherwise than according to the ordinary rule of Hindu law. In the *Merangi* case, the zemindari was originally held under military tenure and continued to be held on the same tenure after it had been incorporated in another zemindari, and subsequently, by conquest, it again became part of the Vizianagram Zemindari, which was dismembered in 1795. In 1803 a permanent settlement was made with the then Zemindar and a *sunnad* was granted to him as prescribed by Regulation XXV of 1802. In 1827 the zemindari was sold in execution of a decree and bought by Government.

The Government held it for some time and during this time the Dewan of the former Zemindar rendered some important service to the Government in capturing some rebels and, as a reward, the Zemindar's men begged

¹ *Rajah Venkata Narsimha Appa Row Bahadur v. Rajah Narayya Appa Row Bahadur* 7 I. A. 38 (1879).

² *Zemindar of Merangi v. Sri Rajah Satru Charla Ramabhadra Itazu*, 18 I. A. 45, (1891); S.C. 14 Mad. 237,

that a new grant might be given to the son of the former Zemindar. The grant was accordingly made in 1835 by a *sunnad*. Under the terms of the *sunnad* there was no intention of the Government to create an imitable estate.

In view of the nature of grants and various dealings with the estate, and in the absence of proof of any usage of imitatibility it is clear that the zemindari of Merangi might have been imitable before, but became "itable in a question of succession as it became also subject to the disposition of the Zemindar by deed of transfer on sale or gift of the whole or part of the property."¹

An imitable zemindari, though forming part of the family property had, by ancient custom, been held and enjoyed by the eldest male member in the direct line. At the death of the last owner he left surviving him four sons and an infant grandson (*i.e.*, the son of the eldest son who predeceased him). During the minority of that grandson, the four surviving sons with the knowledge and consent of their father executed *sunnad* by which they divided the family property equally amongst themselves, the zemindari going to the share of the grandson. It was held that the *sunnad* amounted to an agreement by which the joint family was divided. Consequently upon the death of the grandson without issue his widow succeeded to his estate.

An estate which, according to the family custom of the original proprietor, was descendible entire to the eldest son, may become divisible when passing to another Hindu family in which the practice of division exists. The custom of succession by the eldest son obtained in the family of the former owner is no bar to the division amongst the heirs of the purchaser of the estate, in whose family the ordinary rule of Hindu law prevails.²

¹ *Vadrevu Ranganayakamma v. Vandrevu Bulli Ramaiya* 5 C. L. R. 439 (p. c.) [1879]; s. c. 3 Shomo 90. * *Gopal Das Sindh, Mann Datta, Mohapatra v. Nuratum Sindh* 7 S. D. Sel. Rep. 198 (230) [1845]; s. c. 1 S. D. Decis. 72.

Partition of
an Impartible
estate.

Where it appeared on evidence that the estate had not invariably devolved entire on the chief heir, but had been taken by the most competent and had been occasionally held by several heirs conjointly, the Court considered it to be divisible among the heirs according to the Hindu law of inheritance and decreed partition of the estate in opposition to the claim of one heir to hold the same as an indivisible estate.¹

Impartible
Taluqas of
Oudh.

Under sec. 8 of Act I of 1869 certain lists were prepared of Taluqdars and grantees in Oudh. Of these lists, list 2 was a list of "the Taluqdars whose estates, according to the custom of the family on and before the 13th February, 1856, ordinarily devolved upon a single heir." The third list was a "list of Taluqdars, not included in the second of such lists, to whom *sunnads* or grants had been or may have been given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *sunnads* or grants should thereafter be regulated by the rules of primogeniture." So, in *Achal Ram v. Udai Partab Addiya Dat Singh*² the estate in question was entered in the second list and consequently it was held that although the estate was to descend to a single heir, it was not to be considered as an estate passing according to the rules of primogeniture. Similarly in the case of *Thakur Ishri Singh v. Baldeo Singh*³ the estate in dispute was an impartible estate, but as the taluqdari had been entered in list 2, and not in list 3, a rule of selection, and not primogeniture, was the governing rule of the family. The

¹ *Girwurdharee Singh v. Kulahol Singh* 1 S. D. Sel. Rep. 9 (12) [1825]. This decision was confirmed on appeal by the Judicial Committee. See 2 Moo. I. A. 344 (1840).

See also *Rajah Sooranay Venkatapetty Rao v. Rajah Sooranay Ramachandra Rao*, Mav. Decis. 495

(1825). From the decree of the Suddur Adawlut in this case an appeal was preferred to the Judicial Committee, but the appeal terminated in a *Rizumah* being filed by both parties.

² 11 I. A. 51 (1883).

³ 11 I. A. 135 (1884); s. c. 10 Cal. 792.

usage established by prescription in the family was said to be that, out of several sons, an able one had to be selected and nominated as taluqdar without reference to seniority. This is something like tanistry, which prevailed in Ireland and was abolished by James I.

Where an estate is placed in list 2, it descends to a single heir, not necessarily by the rule of lineal primogeniture. It may be that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals or other persons in the line of heirship. If so, degree prevails over the line according to the classification under the Act ; though if two collaterals, or persons in the line of heirship, are equal in degree, then, as the property can go to one, recourse must be had to the seniority of line to find out which that one is.¹

An imitable estate taken by a son by heritage from his father, is an asset for the payment of father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts.² Where debts are proved to have been contracted for legal necessity the successor to the imitable estate takes it subject to that liability.³

In the case of *Nachiappa Chettiar v. Chinnavasami Naicker*⁴ the contest was whether the *zamin* is an asset for the payment of the debts of the last holder. The question was argued on the analogy of an imitable estate being alienable, and therefore it was contended that the plaintiff's debt on a promissory note could be recovered from the *zamin* as an asset in the hands of the successor of the last holder. In this case there was no issue tried as to whether

¹ *Narindar Bahadur Singh v. Achal Ram* 20 I. A. 77 (1893). See also *Muttayan Chettiar v. Sangili Vira Tandina Chinnatambiar* 9 I. A. 128 (1882).

Kher v. Husain Khan 26 Cal. 81 (P. C.) [1898]; s. c. 2 C. W. N. 737.

² *Veera Soorappa Nayani v. Dappu Naidu* 29 Mal. 451 (1903).

³ *Gopal Prashad Bikash v. Rajah Bibya Singh Deb* 9 C. W. N. 330 (1904).

⁴ 29 Mal. 453 (1903).

Liability of
Imitable
property for
debt,

the estate was imitable or not. Both the Judges, however, held that even if the estate should be shown to be imitable, the *zamin* could not be looked on as an asset in the hands of the successor for the payment of the debts of the deceased holder.

Where the right of primogeniture exists in a Mitakshara family, the son who takes the estate by descent by virtue of that right does not become a co-sharer in the estate and does not take by survivorship, and such an estate is not *prima facie* inalienable. The son takes the estate with the burden of the decree obtained against the father and is liable to be proceeded against in execution.¹

Proof of Im-
partibility.

A custom of imitatibility must be strictly proved in order to control the operation of the Hindu law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition.²

Ghatwali
Tenures.

Ghatwali tenures are grants of lands situated on the edge of the hilly country, and held on condition of guarding the *ghats* or passes. Generally, a small quit-rent is payable to the Zemindar, in addition to the service rendered, and though the grant is not expressly hereditary, and *ghatwal* removable for misconduct, it is the general usage on the death of a faithful *ghatwal* to appoint his son, if competent, or some other fit person in his family to succeed to the office.³ *Ghatwali* tenures are in existence in the districts of Bhagulpore, Bishenpore, Burdwan, Bankura, Beerbhook, Burrakur and other places in Behar, Bengal and Sonthal Pergunnahs.

¹ *Ramdas Maricari v. Tehait Brojo Behari Singh* 6 C. W. N. 879 (1902).

² *Thakur Durryas Singh v. Thakur Dari Singh* 1 I.A. 1 (1873); S.C. 13 B. L. R. 165; S. C. 16 W. R. 142.

³ *Kustvora Kumari v. Monohur Deo*, W. R. 39, p. 41 (1864); *Munrunjun Singh v. Rajah Leelanund Singh* 8 Sevotre 830a (1865); S. C. 4 Rev. Judl. Pol. 461; S. C. 5 W. R. 101.

In some *Zemindaris* and *Putnees* these tenures are of a major, in others of a minor, character. Sometimes the tenure of the great Zemindar himself seems to have been originally of this character. More frequently, large tenures consisting of several whole villages are held under the Zemindar; in other places, as in Bishenpore, the *Sirdar* and superior *Ghatwal* have small and specific portions of land in different villages assigned for their maintenance. These are of a nature analogous to the *Chakeran* assignments of lands to village watchmen in other districts.¹

The exact origin of each *Ghatwali* tenure is generally lost in the confusion and obscurity of the troublous ages which preceded British rule. But there can be no doubt that these tenures have been in existence from a considerable period back and were highly useful in those early days. They were in cases of large tenures in the nature of semi-military colonies, where a chief with his followers were settled down in a part of the country so unsafe that it could not be otherwise occupied. It seems to have sometimes happened that when the country liable to be harried and plundered by freebooters from the hills, was almost entirely reduced to jungle and desolation, one of these semi-military colonies was settled down under a grant to the chief. And, not infrequently, Afghans, Rajpoots, and others came from a distance on these terms, and settling in the jungle lands, defended themselves and their neighbours and brought the lands into cultivation.²

The *Ghatwali* tenure differs from the common *Chakeran* lands in two respects, *firstly*, that the land is not liable to resumption at the discretion of the land-holder, nor the assessment to be raised beyond the established rate, and, *secondly*, that although the grant is not expressly hereditary and the *Ghatwal* is removable for misconduct, it is the general usage, on the death of a faithful *Ghatwal*, to

Origin of
Ghatwali
tenure.

Difference
between
Ghatwali and
Chakeran
lands.

¹ Harrington's *Analysis*, Vol. III.
510.

² Vide 4 Rev. Judl. Pol. 463.

appoint his son, if competent, or some other fit person in his family to succeed to the office.¹

Rule of succession to a *Ghatwali* tenure.

Succession to a *Ghatwali* tenure is regulated by no rule of *Kulachar* or family custom, nor by the Hindu law. By the nature of the tenure, it descends undivided to the eldest son to the exclusion of the others. A female is not incapable of holding a *Ghatwali* tenure.²

The word "descendants" in sec. 2, Bengal Regulation XXIX of 1814, is not to be construed in its strictest meaning. It should not be restricted to 'issue of the body only' but should mean the heirs generally. Therefore it may include a widow of the deceased, who may be one of his heirs.³

Not a joint family property.

In consequence of the peculiar character of *Ghatwali* tenures as described in Regulation XXIX of 1814, they are intended to be the exclusive property of the *ghatwal* for the time being and not joint family property.⁴

In Bhagulpore and Beerbhoom.

The right of succession to a *Ghatwali* tenure (Taluk Khooria in the district of Bhagulpore) is in the eldest son and his descendants and representatives.⁵ In Beerbhoom *Ghatwali* tenures are held in perpetuity and divisible from generation to generation, subject to certain conditions and obligations. They are not divisible on the death of a *Ghatwal* among his heirs, but should devolve entire on the eldest son or the next *Ghatwal*.⁶ A widow of the deceased *Ghatwal*, whose brothers had

¹ *Ibid.* See also Regn. XXIX of 1814 which defines the *status* of a *Ghatwal*.

² *Musat, Kustoora Koomari v. Monohur Deo W. R.* 39 (1864); *Doorga Persad Singh v. Doorga Konwari*, 4 Cal. 190 (P. C.) [1878]; *Chhatradhari Singh v. Saraswati Kumari* 22 Cal. 156 (1894).

³ *Chhatradhari Singh v. Saras-*

wati Kumari, 22 Cal. 156 (1894).

⁴ *Ibid.*

⁵ *Musat, Teetoo Koonwaria v. Surwan Singh* 9 D. Decis 765 (1853).

⁶ *Hurlall Singh v. Jorarun Singh* 6 S. D. Sel. Rep. 169 (204) [1837]. Referred to in *Raja Lila-nund Singh Bahadoor v. The Bengal Govt.* 6 Moo. I. A. 101 p. 125 (1865).

separated, succeeded to the *Ghatwali* tenure on the death of her husband.¹

Ghatwali tenures in Beerbhoom being not the private property of the *Ghatwal*, but land assigned by the State in remuneration for specific public service, are not alienable or attachable for personal debts.²

Under Sec. 2 Regulation XIV of 1819, the *ghatwals* of Beerbhoom cannot alienate their tenures. Their estates cannot be void so long as they perform all the obligations of service and pay rent to Government incident to their tenure. Therefore, a perpetual sub-lease, granted *bona fide* to a party by a *ghatwal* will be good not only during the tenancy of the grantor, but, after his decease, during the tenancy of his heirs.³

Generally, when the performance of the service for which the tenure was created ceases to be necessary, or when the *ghatwal* is dismissed for his neglect of duty, a zemindar in whose estate the *ghatwali* land is included may resume it.⁴ But where an obligation of service continues, the Zemindar is not competent to resume the land. Nor is the Government competent to resume it. For, if the services of the *ghatwals* are no longer necessary, the land will lapse to the zemindar.⁵ Such resumption is only possible where the tenure is not held under a *Sunnad* conferring an hereditary indefeasible right.⁶

Under tenure.

Resumption
of a *Ghatwali*
tenure.

¹ *Chhatradhari Singh v. Sarawati Kumari*, 22 Cal. 156 (1894).

² *Surtuk Chunder Dey v. Bhagut Bharutchunder Singh* 9 S. D. Decis 900 (1853); *Piowderam Sein v. Deputy Commissioner of Sonthal Pergunnahs* 3 Wyman 124 (1867).

³ *The Deputy Commissioner of Beerbhoom v. Rungololl Deo* 1 Hay 200 (1862); s. c. 1 Marshal 117 : s. c. 1 Ind. Jur. 34; *Mukurbhanoo Deo v. Kostoora Koovnaree*. 8 Sevestre 823 (1866).

⁴ *Takayet Jagmohan Singh v. Bahaj Neelanund Singh* 13 S.D. Decis 1812 (1857).

⁵ *Raja Anundalal Deo v. Government* 14 S. D. Decis Part II. 1669 (1858).

⁶ *Rajah Leelanund Singh v. Surwan Singh*, 8 Sevestre, Part IV, 311 (1866) : s. c. 5 W. R. 292; *Surwan Singh* 2 Ind. Jur. N. S. Vol. II. 149 (1867) appln. for review; *Rajah Leelanund Singh v. Nussab Singh*, 2 Wyman, Part I. 84 (1866) : s. c. 6 W. R. 80 (1866) :

A full Bench of the Calcutta High Court held that where a *Ghatwali* tenure was granted under a valid *Sunnad* from a person representing the then Government in that behalf, more than 100 years ago, and had been allowed to change hands by descent or purchase, without question, the zemindar was incompetent of his mere motion, without the assent and against the will of the Government, to put an end to the *Ghatwali*, to deprive the *Ghatwals* of the tenure and to treat them as common trespassers.¹

Where a zemindar compounded with Government for money-payment in lieu of police services which he was bound to render through the *Ghatwals*, and claimed resumption of their tenure held under a *Sunnad* which described the tenure as a *Mukurraree istemraree* (the word *Mukurraree* refers to fixity in respect of *jumma*, and the word *istemraree* refers to perpetuity in point of time,) at a fixed *jumma*, in compensation for services in guarding the mountainous country and passes, the Court held that "the contract between the Plaintiff-zemindar and the Government being without authority of the Legislature, in no way affects the *status* and rights of the *Ghatwals*. The service being required, they are bound to perform it, and by custom they hold the tenure subject to the performance of it. No act of Government and the zemindar can defeat the rights of *Ghatwals*. Their *status* is indicated expressly by *istemraree*, perpetual in the *Sunnad*."²

The Privy Council has decided that the lands constituting the *Ghatwali* tenures in Kharagpore in the district of Bhagalpore are included in the permanent settlement of that estate and covered by the *jumma* assessed upon it,

Mahabob Hossein v. Pntasoo s. c. in the Privy Council 14 Moo. Koamaree 10 W. R. 179 (1868). I. A. 247 (1871).

¹ *Koolodeep Narain Singh v. Makadeo Singh* B.L. R. Supp. Vol. 559 (1866); s. c. W. R. 199, (F. B.) : ² *Munrunjan Singh v. Rajah Leelanund Singh* 8 Sevestre 830a (1865).

and they are not liable to resumption under clause 4, Sec. 8, Regulation I of 1793, as included in allowances made to zemindars for police purposes. In this case the Government had claimed a right to resume or re-assess lands in the zemindari of Kharagpore which were in the possession of various *Ghatwals* who held them under *Ghatwali* tenure from the zemindar.¹ Later on, in another case their Lordships held in respect of these lands that a certain *Ghatwali* tenure, which had been created before the permanent settlement at a fixed rent, could not be determined by a zemindar dispensing with the *Ghatwali* services (which as between him and Government were no longer required) so long as the *Ghatwals* were willing and able to perform those services. Certain other *Ghatwali* tenures which had been created after the permanent settlement could not, under Regulation XLIV of 1798, be cancelled by a purchaser at a sale for arrears of Government revenue. In this case the Government having wrongly resumed certain *Ghatwali* lands were directed to refund mesne profits thereof, which consisted of the rent paid by the *Ghatwals* under a settlement in force with them until the resumption was set aside.²

In a very recent case the Calcutta High Court held in respect of a *Ghatwali* tenure in the district of Bankura, existing from before the grant of the Dewany to the East India Company and descending from father to son for many generations upon payment of a quit-rent and the performance of *Ghatwali* services, that the tenure was not merely heritable but also permanent and the holder was bound to perform the services; that a tenure of this description could not be determined or resumed on the ground that the services were no longer necessary or had been dispensed with.³

¹ *Rajah Leelanund Singh v. The dur v. Thakoor Munoorunjan Bengal Government* 7 Sevestre Singh I. A. Sup. Vol. 181 (1878). 1051 (1864).

² *Jogendra Nath Singh v. Kuli Charan Roy* 9 C. W. N. 663 (1905).

³ *Rajah Leelanund Singh Baha-*

An auction-purchaser of a zemindari at a sale for arrears of Government revenue, cannot resume lands held under a *Ghatwali* tenure, at a fixed rent created before the permanent settlement, on the ground that the services have ceased to be performed by the *Ghatwal*, and there was no necessity for such service, if the Government refuse to renounce its claim to the performance of such *Ghatwali* services.¹ The *Ghatwals* are dependant *Taluqdars* within the meaning of Regulation VIII of 1793 and are protected from enhancement of rent by cl. 1 of Sec. 51 of that Regulation.²

Sale of *Ghatwali* tenure in Kharagpore.

On a question as to whether the sale and transfer of a *Ghatwali* tenure in the Kharagpore Zemindari in the district of Bhagulpore, in execution of a decree against the *Ghatwal*, is invalid by reason of the tenure being in its nature inalienable, the Judicial Committee have held, in regard to a proved custom, that the *Ghatwali* is not inalienable but may be transferred by the *Ghatwal* or sold in execution of a decree against him, if such alienation is assented to by the zemindar. This power of alienation is not limited to the life-interest of the *Ghatwal* for the time being but forms his right and title to the *Ghatwali*.³ Their Lordships are of opinion that the *Ghatwali* tenures are rendered, by their origin and incidents, distinct in some particulars from other inheritances, and to them the law of Mitakshara, to its full extent, is not applicable. Thus the rules of the Mitakshara yield to a well established custom, though only to the extent of that custom.⁴

In *Rajkishwar Deo v. Bunshilhur Marwari*⁵ it has been held that after deduction of all necessary out-goings from the total rents due to a *Ghatwal* the residue, being his own absolute property, may be attached in execution

¹ *Kooldeep Narain Singh v. Cal. 251 (1877).*
The Government 14 Moo. I. A. 247 (1871).

² See *Lekhanand Singh Bahadur v. Anand Roy 15 Cal. 471 (P. C.) [1878].*

³ *Ibid p. 481.*

⁴ *Thakoor Munrujan Singh 3 23 Cal. 873 (1896).*

of a personal decree against him. This case distinguished *Bally Dobey v. Gomi Deo*,¹ and approved *Kustoora Kumari v. Benoderam Sen*.²

A *Ghatwal* is not competent to grant a lease in perpetuity, and his successors are not bound to recognize such an incumbrance.³ Any presumption that there may be against the right of a *Ghatwal* to grant a *Mokurraree* lease, cannot be held good against such leases when granted in good faith for the clearance of jungle.⁴

The dismissal of a *Ghatwal* will carry with it the forfeiture of his tenure.⁵ Where a *Ghatwal* becomes incapable of personally performing the services and a deputy is appointed to act in his behalf, (conformably with the terms of the *Sunnad* or with the usage), by the Magistrate, the incapacity on the part of the deputy to discharge adequately the duties incidental to the office will not operate as a forfeiture of the appointment of the principal. Where, therefore, during the lifetime of a *Ghatwal*, his son, who was appointed deputy, was dismissed, it was held that the dismissal of the son did not amount to the dismissal of the father. And that after the father's death the son was entitled to succeed although during his father's life-time he had been dismissed while acting as the deputy of his father.⁶

Forfeiture of
Ghatwali
lands.

With reference to *Jagir Chakeran* lands, granted by *Sunnads* rent-free anterior to the Decennial Settlement, for the performance of certain services, which though now obsolete, might again be required to be performed, the Judicial Committee held that the *Sunnads* created a *Chakeran* or service tenure, not affected by Sec. 41 of Bengal

Jagir Chakeran
lands.

¹ 9 Cal. 388 (1882).

² *Singh* 5 Cal. 740 (1878). See also

³ 4 W. R. Misc. Rule 5.

Monorunjun Singh v. Rajah Leclan-

⁴ *Grant v. Bungshee Dco* 15 W. R. 38 (1871).

nund Singh 8 Sevestre 830a per
Kemp J.

⁵ *Davies v. Debee Mahton* 18 W. R. 376 (1872).

⁶ *Jogendra Nath Singh v. Kali Charan Roy* 9 C. W. N. 663 (1905).

⁷ *The Secy. of State v. Poran*

Regulation VIII of 1793, were *pro servititis impensis et impeudiendis*, partly as a reward for past, and partly as an inducement for future, services ; and that the grantees, though liable to forfeit the lands, if they wilfully failed in the performance of the duties imposed by the *Sunnads*, were not liable to have such lands resumed, on the ground that there was no longer occasion for the performance of the particular service required. As it was a tenure created before, and subsisting at the time of the Decennial Settlement, and then held rent-free, the presumption was that the lands were treated as *Lakhray* and the *Jagir* was within the exception of Sec. 26 Act I of 1845. The *onus* was upon the auction-purchaser who sought to dispossess or to rack-rent the grantees under the *Sunnads*, to make out a clear title for resumption.¹

Chakeran
lands.

Chakeran lands are lands set apart and appropriated as a remuneration for services by village watchmen and zemindari "paiks." At the decennial settlement these service-lands were not included in the assessment on which the settlement was based. As before settlement they were appropriated to particular purposes so they remained after the settlement. Burdened with these charges, these service-lands were declared to be the property of the zemindar. Though in the case of zemindari "paiks," the zemindar can, at his pleasure, resume the lands, in that of the village watchmen he cannot. While the public service required them they must remain appropriated to these purposes.² In a certain case the plaintiff contended that the lands in question were "*gram sarujami chakeran*" and upon the cesser of services he was entitled to take possession of them. The Collector asserted that the lands were *Tunnahdari* or *Chowkidari Chakeran* and as such were not resumable while the holder of the lands

¹ *Alexander John Forbes v. Joy Kisseen Mookerjee v. The Meer Mahomed Tuquee*, 13 Moo. I. C. 438 (1878).
² *Collector of East Burdwan v. Sevestre* 1153 (1860).

continued to perform the police service. The Sudder Court, by a majority, affirmed the decree of the Zillah Court, which was in favour of the Collector-defendant. The Privy Council, too, affirmed it on appeal on 5th May, 1864, holding that "the lands in question are to be considered as appropriated to the maintenance of a Chowkidar or village watchman in the *taluk*, and that the right of appointing such officer belongs to the *Taluqdar*, and that such officer is liable to the performance of such services to the *Taluqdar* as, by usage in the zemindari of Burdwan, Chowkidars have been accustomed to render to the Zemindar"¹ Whether or not it is competent to the zemindar on providing an equivalent in money to resume the *Chowkidari Chakeran* lands within his estate was a question not then before the Conrt, the plaintiff asserting his right to resume without providing any equivalent.

A *Polliam* is explained in William's Glossary to be "a tract of country subject to a petty chieftain." A *Polligar* is described as having been originally a petty chieftain occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount state, but seldom paying either, and more or less independent; but as having, at present, since the subjugation of the country by the East India Company, become a peaceable landholder.

A *Polliam* is in the nature of a Raj; it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the *Polligar*, the other members of the family being entitled to a maintenance or allowance out of the estate.²

The decisions in *K. Subba Chetty v. Masti Immadi Rani*³ and *D. Arbuthnott v. Oolaguppa Chetty*⁴ treated the *polliams*

¹ Ibid.

⁶⁶ at pp. 85, 86 (1861).

² *Naragunty Lutchmedaramah*

⁸ Mad. H. C. R. 303 (1867).

³ *Vengama Naidoo* 9 Moo. I. A.

⁵ Mad. H. C. R. 303 (1870).

only as life estates and the judgment in *Chauki Gounden v. Venkataramanier*¹ states that such was then the generally received theory. This was probably true under the Hindu and Mahomedan Governments in the case of those zemindars or *polligars* who were only Revenue or Police Officers before custom rendered their estates hereditary.²

An imitable *Polliam* governed by the rule of primogeniture, though possessed exclusively by one of the members of the family, is the joint property of the family and, in the event of death, passes by survivorship. When, on the death of a *Polligar*, the right of exclusive possession passes from one line of descent to another, it devolves, in the absence of proof of special custom of descent, upon the nearest coparcener in the senior line, and not necessarily on the coparcener nearest in blood.³

In a suit for partition of a *Polliam* in the Madura district, it appeared that the *Polliam* had been held on military tenure since the sixteenth century and that it had never been partitioned, and that the custom of imitability obtained in a large number of similar *Polliams* in the same district; on enquiries from the members of the zemindars' family and other persons connected with the zemindari it was elicited that they understood the estate to be imitable and that it descended to a single heir. It was held that the *Polliam* was imitable and the plaintiff was entitled to maintenance.⁴

In this case it was further held that certain "pannai" lands within the limits of the zemindari, which have been

¹ 5 Mad. H. C. R. 208, 211.

² *Nachiappa Chettiar v. Chinayayasi Naicker*, 29 Mad. 453 p. 455 (1906).

³ *Narganti Achammagaru v. Venkatachalapati Nayanivaru* 4 Mad. 250 (1880); *Kachi Yura Rangappa Kulakka Thola Udayar v. Kachi Kalyona Rangappa Kal-*

laka Thola Udayar 24 Mad. 562 (1901); *Kachi Kaliyana Rungappa Kalakka Thola Udayar v. Kachi Yura Rangappa Kulakka Thola Udayar* 28 Mad. 508 (P. C.) (1905); s. c. 10 C. W. N. 95 : s. c. 2 C. L. J. 231.

⁴ *Lakshmipathi v. Kundusami* 16 Mad. 54 (1892).

recognized and dealt with as part and parcel of the zemindari, were impartible.

The rule of succession applicable to a *Polliam* is that of *Dayadi-pattam*, according to which the person entitled to succeed on the death of *polligar* is the senior in age of his *dayadis*, descended from one of those who originally formed the joint family and were founders of different lines in the family. The *polligar* for the time being has a proprietary right in the estate and is not a manager merely. Where the holder of the impartible *Polliam* transferred his estate to his wife by a deed of gift and the transferor had at that time living besides his own son numerous *dayadis*, it was held that the custom of inalienability was established and that the gift in question was accordingly invalid as against the *dayadis*.¹

Dayadi-pattam.

An impartible *Polliaput* or *Polliam* held by one member of the family descends on a single heir as an ancestral estate the right to which vests, on the last holder's death without issue, in the next collateral male heir of the undivided family in preference to the widow of the deceased.²

As to the succession to a *Polliam* according to priority of birth, see *Pedda Ramappa Nayanivarn v. Bangari Seshamma Nayainvarn*,³ or priority of marriage of the mother, see *Sandaralin Goswami Kamaya Naik v. Ramaswami Kamaya Naik*.⁴

The acceptance of a *Sunnad* in common form under Madras Regulation XXV of 1802, does not, of itself and apart from other circumstances, avail to alter the succession to an hereditary estate. Thus in the case of "*Udayarpalayam*" it was found that the estate of the Udaipur *Polligars* was in its origin impartible, and after cession of the

A *Sunnad*
under Madras
Reg. XXV.
1802 and its
effect on here-
ditary estate.

¹ *Sivaenubramania Naicker v. Saluhai Terer alias Oyya Terer Krishnammol* 18 Mad. 287 (1894). ² Mad. H. C. R. 157 (1875).

Sartaj Koeri 10 All 372 dis- ³ 8 I. A. 1 (1880).
tinguished. ⁴ 26 I. A. 55 (1899).

* *Pareyasan alias Kollai Tevar*

Carnatic to the Company was, for political reasons, circumscribed in extent and was converted into a zemindari which was granted and accepted as equivalent in value to the ancient *Polliam*. It was held that the character of imparibility was not changed and the zemindari must be regarded as imitable and descendible according to the rules of primogeniture.¹

Jagirs or Saranjams.

Jagirs are tenures common under the Mahomedan Government, in which the public revenues of a given tract of land were made over to a servant of the State, together with the powers requisite to enable him to collect and appropriate such revenue, and administer the general government of the district.² *Saranjams* are temporary assignments of revenue from villages or lands for the support of troops or for personal service, usually for the life of the grantee ; also grants made to persons appointed to civil offices of the State to enable them to maintain their dignity. They were neither transferable nor hereditary, and were held at the pleasure of the Sovereign.³

Colonel Etheridge in the Preface to the List of *Saranjams* published in 1874 speaks of these two terms thus :— “Under the Mahomedan dynasty such holdings were known as *jagir*, under the Mahratta rule as *saranjam*. If any original distinctive feature marked the tenure of *jagir* and *saranjam*, it ceased to exist during the Mahratta Empire ; for, at the period of the introduction of the British Government, there was no practical difference between a *jagirdar* and a *saranjamdar*, either in the Deccan or Southern Mahratta country. The terms *jagir* and

¹ *Kachia K. R. K. T. Udayar v. Kachi Y. R. K. T. Udayar* 28 Mad. 508 (p.c.) (1905) : s. c. 10 C. W. N. 95 : s. c. 2 C. L. J. 231.

² Prof. Wilson's *Glossary*.

³ *Ramchandra Mantri v. Venkataraao*, 6 Bom. 598 at p. 604 et seq. See other authorities cited therein. See also Steele on *Law and Custom* p. 207.

saranjam are convertible terms in these districts. The latter is now almost universally adopted. These holdings, being of a political character, were not transferable, nor necessarily hereditary, but, as a rule, were held at the pleasure of the sovereign. On succession a *nazarana* was levied. When of a personal nature, they were termed *Zat Saranjam*, when for the maintenance of troops *Fonj Saranjam*.¹

Colonel Etheridge's observation that *jagirs* were not necessarily hereditary, was taken exception to by Melvill J., as not being correct.² The Judicial Committee in *Gulabdas Jagjinandas v. the Collector of Surat*,³ said that a *jagir* must be taken, *prima facie*, to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary.

In the Fifth Report of the Select Committee on Indian affairs (p. 86) it was said : "With regard to the *jagirs* granted by Mahomedans either as marks of favour or as rewards for public service, they, generally, if not always, reverted to the state on the decease of the grantee, unless continued to his heir under a new *Sunnad*; for, the alienation in perpetuity of the rights of Government in the soil was inconsistent with the established policy of the Mahomedans, from which they deviated only in the case of endowments to the religious establishments and office of public duty, and in some rare instances of grants to holy men and celebrated scholars."⁴

Westropp C. J., in *Krishnarav Ganesh v. Rangrav*⁵ said "Sanadi grants in Inam, Saranjam, Jagir, Wazifa, Wakf, Devasthan, and Sevasthan, are, generally speaking, more properly described as alienations of the royal share in the produce of land i. e., of land revenue,

¹ Cited in 6 Bom. p. 603 (1882). v. *Venkatrao* 6 Bom. 598 p. 601

² 6 Bom. 603.

(1882).

³ 3 Bom. 186 (1878).

⁴ 4 Bom. H. C. R. A. C. J. 1

⁵ Cited in *Ramchandra Mantri* (1867).

than grants of land although, in popular parlance, they are occasionally so-called." His Lordship repeated almost the same observation in *Ravji Narayan Mandlik v. Dildaji Bapuji Desai*.¹ In fact this observation has frequently been quoted and the principle involved in it was approved.²

In the case of *Ramchandra Mantri*³ their Lordships, after very carefully considering various authorities, held that a grant in *jagir* or *saranjam* is very rarely a grant of the soil, and the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it.

Regarding the imparibility of a *saranjam*, the rule stated by Colonel Etheridge is in accordance with the orders conveyed in a despatch from the Court of Directors No 27, dated the 12th December, 1855. In para. 20 of that despatch they say 'We agree with you that *saranjams* should not be subdivided but that the holders should be required to make a suitable provision for their youngest brothers.' A *jagir*, to which service is attached, is certainly not divisible, but descends to the eldest son.⁴ In *Ramchandra Mantri v. Venkatarao* the Court observed that the *Saranjam* was originally given for the maintenance of a body of horse, and was therefore in its inception a *Jagir* held for service. But independently of this, and of any Government rule, the same principle would probably be applied to all *Saranjams* on the ground stated by Mr. Mayne (Hindu Law, s. 393), that an estate which has been allotted by Government to a man of rank, is indivisible, as otherwise the purpose of the grant would be frustrated."⁵ It may therefore be said that a *saranjam* is impartible and devolves entire on the eldest son and, on the

¹ 1 Bom. 523 (1875).

² 6 Bom. 598 (1882).

³ *Vaman Janardan Joshi v. the Collector of Thana* 6 Bom. H. C. R. A. C. J. 191 (1869).

⁴ *Vide* 6 Bom. p. 613.

⁵ 6 Bom. 598 p. 613.

death of the latter, descends to his son in preference to his surviving brother.¹

It is for the Government to determine how *saranjams* are to be held and inherited and in cases where the civil courts have jurisdiction over claims relating to *saranjams* in consequence of the applicability of the Pension Act XXIII of 1871 or otherwise, they would be bound to determine such claims according to the rules, general or special, laid down by the British Government. In the absence of such rules, the courts would be guided by the law applicable to imitable property.²

Saranjams are *prima facie* imitable, the holders thereof being required to make a suitable provision for their younger brothers. Where, however, it appeared that the members of a family had treated *saranjams* as partible over a long period of years and had dealt with them as such in effecting partitions of the entire family estate, which consisted both of incomes and *saranjams*, it was held that the *saranjams* were either originally partible or had become so by family usage.³ In a suit by a junior member of an undivided Hindu family for division of a *saranjam* and other family property, the eldest member contended that the *saranjam* was imitable and that in any case he was entitled to retain certain sums in his capacity as the eldest representative of the family for the performance of certain offices. The court held that the right of *vadilki* (eldership) had not lost its original character of imitatibility and that it was imitable and transmissible to the eldest representative of the family.⁴

As a *saranjam* is ordinarily imitable, if it is resumed by the British Government and in substitution thereof a political pension is granted, the latter also becomes

¹ See 6 Bom. 598, and *Narayan katarao* Bom. 598 (1882).

Juggannath Dikshit v. Vasudeo ² *Madhavrao Manohar v. Atmu-Vishnu Dikshit* 15 Bom. 247 (1890). ³ *Ram Keshav v. Ven-* ⁴ *Ibid.*

¹ *Ramchandra Mantri v. Ven-*

impartible and is protected from the process of the civil court by Sec. 11 of the Pension Act (XXIII of 1871).¹

In *Nilmoni Singh Deo v. Bakranath Singh*,² the Privy Council without deciding whether the *jagir* in question was a *Ghatwali* tenure or not, held that its nature had not been altered by the permanent settlement, after which the services due by the *Jagirdars* remained as before, public services, and continued due to the Government. The *jagir*, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or Mahomedan law, but was held upon the condition of approval of the heir by the Government. Therefore either division of the *jagir* upon the death of the holder or alienation during his life was precluded. And consequently the *jagir mahal* was not liable to attachment and sale in execution of a decree against the father and predecessor in state of a *jagirdar* so approved, as assets by descent in the possession of the latter.³

Inam lands.

Mr. Steele in his Law and Custom says the following about *inam* grants:—“*Inams* were given under the late Government from personal favour to Chieftains, Mootusuddies, Sastrees, Josecs, Physicians, Brahman priests and devotees, Gosains and Mendicants, Sahoookars, dancing girls, artisans, sons-in-law, friends, dependants, &c. The subjects of *inam* grants are the Sirkar revenues, or portions of them (as the different Umuls of Mokassa, Babtee &c.) due from villages, and Government land, formerly subject to the discretionary levy of Nuzzurs on alienation, &c. These grants were hereditary, and generally freehold. All the Sovereign princes and great chiefs gave *inams* out of their own territories, and generally obtained the confirmation of

¹ *Ramchandra Sakhararam Vagh v. Sakhararam Gopal Vagh* 2 Bom. 346 (1877).

² 19 Cal. 187 (P. C.) (1882).

³ *Rajah Leelannand Singh v. the Govt.* 6 Moo. I. A. 101 which was followed in the above case.

the supreme authority.”¹ Whether *inam* lands are subject to partition formed the subject-matter of decision in *Gopal Hari Joshi Rairikar v. Ramakant Ranganath Joshi Rairikar*.² In this case the plaintiff sued for partition of an ordinary *inam* village and of a cash balance payable by Government out of the revenue of another village. Admittedly the plaintiff was entitled to a one-fifth share. His claim was resisted on the ground that one particular branch was entitled to manage the village and to receive the cash allowance on behalf of all the co-sharers, and distribute the profits and the cash allowance amongst them in proportion of their respective shares, and that the plaintiff was therefore not entitled to partition. It was held that such *inam* land and allowance was liable to partition at the suit of a co-sharer, except when it was held on *saranjam* or other imitable tenure, or where the terms of the original grant impose a condition upon its enjoyment that the management shall rest with a particular branch of the family of the grantee; and possibly a long-continued practice from which a family custom may be inferred, may operate to bring about the same result.

In a suit for partition of *inam* land, the *onus* of proving imitative lay on the holder of the *inam*. Neither the terms of the grant, nor the subsequent orders of the ruling power, nor any proved custom, as in this case was sufficient to discharge it.³

Vatan lands⁴ are ordinarily imitable and the holders of them have to perform certain duties. A cessation of the performance of the duties of the office of a *Vatan*, *Vatan* lands.

¹ See Steele's *Law and Custom* p. 206.

² 21 Bom 458 (1896).

³ *Vinayuk Waman Joshi Rayarikar v. Gopal Hari Joshi Rayarikar* 30 I. A. 77 (1903); s. c. 27 Bom. 353.

⁴ *Vatans* have been defined in s. 4., Act III of 1874. Amongst the *Marhattas* it has come to import any hereditary estate, office, privilege, property or means of subsistence, a patrimony—Wilson's Glossary.

even though sanctioned by Government, will not alter the nature of the estate and make it partible.¹

In the case of *Adrishappa v. Gurushidappa*² the question was whether a *deshghat vatan* or property attached to the office of a *Desai*³ was impartible or not. The Privy Council, concurring with the High Court, held that property appertaining to the office of *desai* was not to be assumed *prima facie* to be impartible. The burden of proving impartibility lay upon the *desai*; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applied.

Service *Vatan*
Lands.

A Full Bench of the Bombay High Court has laid down that service *vatan* lands become alienable when the services are abolished, except in cases where there is a concurrent family custom operating similarly to keep the *vatan* estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of the public duty does not alter the nature of the estate. If the family custom forbids alienation beyond the life-time of the alienor, the custom will operate equally after the patrimony has ceased to be a *vatan*, as before. Where, however, such a concurrent custom does not affect an estate, then, when it is freed from its connection with the public office, the reason arising from that connection for the preservation of the

¹ *Saritriara v. Anandrar* 12 Bom. H. C. R. 224 (1875) : *Radhabai v. Anantrao Bhagrat Deshpande* 9 Bom. 198 (F. B.) [1885] ; *Ramrao Trimbak Deshpande v. Yesharantrao Mudhabrao Deshpande*, 10 Bom. 327 (1885).

² 7 I. A. 162 (1880) : s. c. 4 Bom. 494 : s. c. 7 C. L. R. 1 : s. c. 3 Shome, 206.

³ The Superintendent or ruler of a Pargana or Province, the principal revenue officer of a district, under the native Government. The office was hereditary and frequently recompensed by grants of land, so that the *Desai* often became a kind of petty chief in the South of India—Wilson's Glossary.

estate necessarily fails, and the lands become subject to the ordinary law of descent and disposal.¹

Majumdarī Vatans are a kind of service *vatans*, and the Government has no power to resume them, where it dispenses with the performance of services in respect of them, if the holders of such *vatans* are ready and willing to perform such services. The Law in the Bombay Presidency recognizes the right of females to hold *majumdarī vatans*, males being appointed by them to perform the service.²

Majumdarī Vatans.

Where in a family of a *deshpande vatanār*, there had been the practice, extending over a century and a half without interruption or dispute of any kind whatever, to leave the performance of the services of the *vatan* and the bulk of the property in the hands of the elder branch, and to provide the younger branches with maintenance only ; it was held that such practice, being more probably due in its origin to a family or local usage than to a mere arrangement determinable at the will of any members of the family, ought to be recognized and acted upon as a legal and valid custom.³ The holder of an hereditary office, such as a *Deshpande Vatan*, cannot create an hereditary deputy. The appointment of a deputy made by a particular incumbent cannot extend beyond the life of such incumbent.⁴

Deshpande Vatan.

In *Bhan v. Ramchandrarao*⁵ the point referred to the Full Bench was whether lands of a service *vatan* become alienable when the services are abolished. It should be remembered that by the Gordon Settlement, services appertaining to a *vatan* had been commuted ; but that did not convert

Deshmukhi Vatan.

¹ *Radhabai v. Anantrao Bhagwant Deshpande* 9 Bom. 198 (F. B.) [1885]. But See *Bhan bin Pommanna v. Ramchandrarao bin Mahipatrao* 20 Bom. 423 (F. B.) [1895].

H.C.R. 202 (1868).

² *Ramrao Trimbak Deshpande v. Yeshwantrao Madharrao Deshpande* 10 Bom. 327 (1885).

³ *Ravji Raghunath v. Mahaderav Vishwanath* 2 Bom. H. C. R. 250 (1864).

⁴ *The Government of Bombay v. Damodhar Parmananda* 5 Bom.

⁵ 20 Bom. 423 (F. B.) (1895).

the *vatan* lands into the private property of the *vatandars* with the necessary incident of alienability and left them attached to the hereditary office, which, although freed from the performance of service, remained in tact as shewn by the definition of *hereditary office* in the declaratory Act III of 1874.¹

Candy J., who referred the point for the consideration of a Full Bench, made the following observations regarding the previous Full Bench case: "As was said in *Radhabai v. Anantrav*² 'by section 5 of the Act the alienation of *any* *vatan* or part thereof is forbidden without the sanction of Government to any person not a *vatandar* of the same *vatan*, and by section 10 power is given to the Collector to set aside any sale or transfer thereof.' If *vatans* under the Gordon Settlement are within the terms of section 5, then, there is nothing to exclude them from the provisions of section 10. No doubt after the decision of the Full Bench in *Radhabai v. Anantrav*, and dated January, 1885, that *vatan* lands become alienable when the services are abolished (a decision now admitted to have been founded on the erroneous idea that the settlement of a service *vatan* could be made under Bombay Act II of 1863) the idea was prevalent in some quarters that section 5 of Bombay Act III of 1874 could not be applicable to *vatandars* settled under the Gordon Settlement."³

The question referred to the Full Bench was whether section 10 of the *Vatandar* Act III of 1874 (Bombay) was applicable to *vatans*, which had been the subject of the Gordon settlement prior to the passing of the Act. The object of section 10 is to supplement the prohibition contained in section 5 against alienation by a *vatandar* to a person not a *vatandar* by enabling the Collector to undo

¹ For "usual services" of a Deshmukh, see *Rangora Naik v. Collector of Ratnagiri* 8 Bom. H.C.R. 107 (1871).

² 9 Bom. 198 (P. B.).

³ 20 Bom. 423 p. 428.

an alienation which may have been effected since the passing of the Act by a decree or order of a Civil Court. The Full Bench has held that section 10 does apply and has retrospective effect.¹

In *Adrishappa v. Gurushidappa*,² the question raised was whether a *deshgat vatan* was or was not an imitable inheritance. A *deshghat vatan* is a property held as appertaining to the office of *desai*. In this case the younger brothers brought a suit for partition against their eldest brother who asserted that inasmuch as he held the office of *desai* and the property in dispute belonged to his office he was entitled to hold it as imitable, subject to the customary right of his brothers to receive allowance by way of maintenance. The Privy Council held that there was no general presumption in favour of the imitatibility of the estates of this kind so as to shift the burden of proof; that it lay upon the *desai*, who sought to show that the estate was imitable, "to give evidence of the special tenure of the *vatan*, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the general law." No such evidence, either of family custom or of district or local custom, had been given to prevent the operation of the ordinary rule of law whereby the property would be partible. Accordingly their Lordships affirmed the decree for partition, accompanied by a declaration that it was to be without prejudice to the right of the *desai* to such emoluments or allowances for the performance of the duties of the desaihip as he might be entitled to under any law in force.

There cannot be two separate *vatans* in connection with one hereditary office. Therefore, when a *vatan* is broken up into shares or *takshims*, those *takshims* do not constitute separate *vatans*.³

¹ See also *Gopalrar v. Trimbaekrar* 10 Bom. 598 (1886).

² *Ramangarda v. Shirapagarda* 23 Bom. 601 (1896).

³ 4 Bom. 494 (P.C.) [1880].

*Deshghat
Vatan.*

Alienation by
a *ratandar*.

An alienation by way of mortgage of *valan* property or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the *ratandar* who mortgaged. The mortgage was in its inception void against the heir of the *ratandar* and had not become validated against the heir by reason of the repeal of the sections in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874.¹

¹ *Padapa v. Sivamirao* 24 Bom. 1886, which is an Act to amend 556 (P. C.) [1900]. See Act V of Bombay Act III of 1874.

CHAPTER VI.

HINDU CUSTOMS.

RELIGIOUS ENDOWMENTS.

Endowments for religious and charitable purposes are quite common in India as in other countries. The whole land, it may be said without exaggeration, is covered with numerous institutions of this character. From a very early period, private as well as public munificence poured in for the cause of charity and religion, for establishing religious centres for teaching and disseminating the sublime knowledge stored in the sacred books of the land. And the result has been the creation of numberless *Mutts*, *Temples*, *Pagodas*, *Asthals* and *Adhinams* throughout the country. These are in the nature of permanent institutions for the benefit of the public, and may fairly be called Public Endowments. Besides these, there are other endowments in which the donor holds the property himself in beneficial ownership, subject merely to a trust as to part of the income devoted to the support of the religious endowment. Among Hindus the common practice is to dedicate lands and property in the name of the family idol or some deity and to vest them in a trustee; generally the donor and his heirs are the trustees or *Shebails*. These we may call Private Endowments. Unlike English law, Hindu law makes no distinction between a private and a public endowment.

The English law relating to superstitious uses has no application to Hindu religious endowments.¹ Gifts

Formalities
and Incidents
of Religious
Gifts.

¹ *Rupa Jagshet v. Krishnaji Andrews v. Joakim Govind* 9 Bom. 169 (1884); *Kusal-O. C. J.* 148 [1859]; *Joseph Ezra-chandy, Mahadergiri* 12 Bom. H. kiel Judah v. Aaron Hye 5 B. L. C. R. 214 (1875); see also *Das R.* 433 (1870).
Mercer v. Cones 2 Hyde 65 (1864).

for religious purposes are valid without the delivery of possession and are not invalid if they violate the rule of perpetuities.¹ Public endowments are ordinarily inalienable,² whereas a private endowment is alienable and partible, but subject to the charge upon it.³ The property dedicated to religious purposes are generally vested in trustees, and such trust when properly made is irrevocable.⁴ When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete and he cannot revoke it by a subsequent Will.⁵ Endowed lands are not hereditable property, and the management of them for religious uses can pass by inheritance.⁶ The

¹ *Kumara Asimkrishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R. (O. C.J.) at p. 47 (1868) Per Markby J.—“It being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *Caput mortuum*, and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English law of perpetuities.”

² *Maharance Shibesource Debya v. Mothooranath Acharya* 13 Moo. I. A. 270 (1869); *Prosunno Kumari Debya v. Golabchand Baboo* 2 I. A. 145 (1875); *Narayan v. Sudanand Ramchandra*, 5 Bom. 393 (1881); *Collector of Thana v. Hari Sitaram* 6 Bom. 546 (1882); *Rupa Jagshet v. Krishnaji Govind* 9 Bom. 169 (1884); *Sri Ganesh Dharnidhar Mahajee v. Keshavrao Govind Kulgaekar*, 15 Bom. 625 (1890); *Ramchandra Shankarbrao Dravid; Kashinath Narayan Dravid*, 19 Bom. 271 (1894); *Trimbak Ramkrishna Banade, v. Lakshman Ramkrishna Banade* 20 Bom. 495 (1895); *Prosunna Kumar Adhikari v.*

Sarodu Prosunno Adhikari 22 Cal. 989 (1895); *Sheo Shankar Gir v. Ram Shevak Chowdhri* 24 Cal. 77 (1896).

³ *Mahatab Chand v. Mirdad Ali*, 5 S. D. Sel. Rep. 268 (313) [1833]; approved of by the Privy Council in *Maharance Brojoroon-dery Debta v. Rance Luchmee Koonwaree* (1873), see full report in 15 B. L. R. 176n (1875); *Futtoo Bibee v. Bhurrut Lull Bhukut* 10 W. R. 299 (1868); *Dasoo Dhul v. Kishen Chunder Geer*, 13 W. R. 200 (1870); *Sonatun Bysack v. Juggut Soondree Dassee* 8 Moo. I. A. 66 (1859); *Shaik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu*, 17 I. A. 28 (1889); s. c. 17 Cal. 498

⁴ *Juggut Mohini Dossee v. Sakhremoney Dossee* 14 Moo. I. A. 289 (1871); s. c. 10 B. L. R. 19; s. c. 17 W. R. 41.

⁵ *Rajaram v. Ganesh* 23 Bom. 131 (1898).

⁶ *Elder Widow of Raja Chutter Sen v. Younger Widow of Raja Chutter Sen* 1 S. D. Sel. Rep. 180 (239) [1807].

Shebait has not the legal property in the lands dedicated to an idol for religious services, but only the title of manager of a religious endowment.¹

When there has been no direct endowment to support the worship of the family idol, although a moral obligation might be created by Hindu usage and custom, such moral obligation will not be held as having any legal operation.²

Of all the religious institutions *Mutts* are the earliest. These institutions were established as centres of theological learning and in order to provide a line of competent teachers to carry on the work of religious propagandism and to spread the particular doctrine of the institution concerned. These are almost invariably presided over by learned and pious ascetics. The word *Mutt* "in its original and narrow sense signifies the residence of an ascetic or *sannyasi* or *paradesi*."³ In regard to origin, growth and object, *Mutts* in India are very much similar to the ecclesiastical bodies in Europe. The origin and growth of *Mutts* is thus described:— "A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order, and instructs in its religious tenets. Such of these disciples as intend to become religious teachers, renounce their connection with their family and all claims to the family wealth, and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being, and a house for the school is erected and a *mattam* is constituted. The property of the *mattam* does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him

Origin of
Mutts.

¹ *Maharance Shibessource Debia* 5 W. R. 29 (1866).

^{v.} *Mathooranath Acharjo* 13 Moo. I. A. 270 (1869).

² *Shamlall Sein v. Hurosoondry Gupta* 1 Ind. Jur. N. S. 36; s. c.

³ *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran,* 10 Mad. 375 p. 380 [1887].

whom he deems the most competent, and in his own life-time installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the *gadi*, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property ; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his *mattam*, and debts so contracted might be recovered from the *mattam* property and would devolve as a liability on his successor to the extent of the assets received by him¹¹. This description represents the nature of the generality of *Mutts* and the incidents of the property which is devoted to their maintenance. There may, however, be exceptions.

*Earliest
Mutts.*

The foundation of *Mutts* in India dates from the time of the great Sankaracharya, who appeared about the 8th century of the Christian era, and was the founder of the *Adwaita* School of philosophy. It was said that before the advent of Sankaracharya, Buddhism flourished and took firm hold in India and the Brahmanical religion was on the point of vanishing from the land. The great Sankaracharya by his superior teachings not only arrested the progress of Buddhism but gradually restored Vedantism in its pristine glory in the land. In his palmy days the great Buddha established monasteries for affording Buddhist monks shelter and abode to learn and meditate, to cultivate

¹¹ *Samartha Pandara v. Sel-lappa Chetti*, 2 Mad. 175 p. 179.

spiritual perfection and attain *Nirvana*. From these Buddhistic monasteries the great teacher of Pantheism or *Adwaitism* took his conception of establishing religious centres of teachings, i. e., *Mutts* where his followers might learn and cultivate, and teach to others, his sublime doctrine of *Adwaitabad*. It was said that he actually founded four *Mutts* for his followers on the basis of the monastic system of Buddhistic *Sangharamas*. After Sankaracharya, founders of other schools of religious philosophy, such as Ramanuj, Madhabacharya, Nanak, Kabir, Chaitanya founded many important *Mutts* for similar purposes.

With regard to the origin of endowed *Mutts* the following passage from the judgment in *Giyana Sambandha Pandara Samadhi v. Kandasami Tambiran*¹ may be cited here :—“In former times these institutions exercised considerable influence over the laymen in their neighbourhood; they became the centres of classical and religious learning and materially aided in promoting religious knowledge and in encouraging religious and other charities. The ascetics who presided over them were held, owing to their position as religious preceptors and often also in consequence of their own learning and piety, in great reverence by Hindu Princes and noblemen, who from time to time made large presents to them and endowed the *Mutts* under their control with grants of land. Thus, a class of endowed *Mutts* came into existence in the nature of monastic institutions, presided over by ascetics or *sannyasis* who had renounced the world.”

The distinction between an *Adhinam* and a *Mutt* as an endowed institution consists in the latter being an isolated institution, whilst the former is the central institution, from which the chief ascetic exercises control and supervision over a group of endowed institutions and religious trusts committed to his manage-

Endowed
Mutts.

Distinction
between an
Adhinam and
a *Mutt*.

¹ 10 Mad. 375 p. 386 (1887).

ment and subject to his jurisdiction as the responsible trustee.¹

Sudra Muttas.

Muttas may be established by sudra *sannyasis*. In fact there are several such *muttas* in India. Dharmapuram and Ternvaduthorai are the chief sudra *muttas* in Madras. These are *Shivite muttas*.² Regarding *Dwandra*, i. e. interdependent *muttas*, see *infra* p. 243.

Temples.

Like *Muttas*, Temples are also religious institutions. They are the most numerous in India. They have been founded as places of common resort for the worship of god and for the growth of spiritual knowledge of Hindu community at large. As a rule temples are endowed far more richly than the sister institutions *viz.*, *Muttas*. Each temple has a presiding deity to which the temple is usually consecrated and the worship of this deity is the primary object of the temple. Each *Mutt* has also a deity attached to it, but its worship is the secondary object, the primary object being the teaching and propagating spiritual knowledge. But, whether a *mutt* or a temple, each is presided over by an ascetic. He has to look after the management of the institution in his charge. The office of superintendent of these religious establishments which are variously known as *Muttas*, Temples, *Mandirs*, *Pagodas*, *Asthals*, *Devasthanams*, *Adhiuams*, *Akkaras*, &c.—is called a *Mohantee* or *Mohuntship* and the incumbent of the office is variously designated as *Mohunt Gosavi*, *Geer*, *Acharya*, *Dharmakarta*, *Swami*, *Adhikari*, *Sardar*, *Panda*, &c.

Difference
between the
position of the
manager of a
temple and
that of head
of a *mutt*.

The Madras High Court in a very recent case has drawn a distinction between the position of the manager of a temple and that of a head of a *mutt*. It holds that

¹ *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran* 10 Mad. 375 at 387 (1887).

Lappa Chetti, 2 Mad. 175 (1879) :
Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran, 10 Mad. 375 (1887),

² *Sammantha Pandara v. Sel-*

the custodian or *dharma-karta* of a temple is a mere trustee who is bound to apply the funds at his disposal in carrying out the object of the trust such as the conduct of the daily worship and the performance of ceremonies. The head of a *Mutt* is not a mere trustee but a "corporation sole" having an estate for life in the permanent endowment of the *Mutt* and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. His power to alienate or charge the *corpus* of the endowment is limited to purposes necessary for the maintenance of the *Mutt*, and alienations or charges will not be binding on the *Mutt* or on his successors merely because they have been made for general religious and charitable purposes appropriate to the head of a *Mutt*.¹ It would seem that the learned Judges came to the above conclusion by holding that "there is a considerable similarity between these *mutts* and ecclesiastical corporations in Europe, in respect of their origin, growth and object."² An endowment to a *mutt* is an endowment to the brotherhood, i. e. to the *Mohant* and his disciples, and an endowment to a temple is a dedication to the presiding deity of the temple. And as idols have all along been treated as perpetual infants, so the provisions of human guardians have been made for the management and preservation of the dedicated property. The Judicial Committee observed :—"It is only in an ideal sense that property can be said to belong to an idol, and the possession and management must in the nature of things be entrusted with some persons as *shehais* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the

¹ *Vidyapurna Tirtha Swami v. 435 (1904).*

Vidyanidhi Tirtha Swami 27 Mad.

² *Ibid p. 433.*

manager of an infant heir.²¹ His Lordship Mr. Justice Bhashyam Ayyanger has very nicely put the distinction between a *mull* and a temple in these words : "The two classes of institutions, *viz.*, temples and *mults*, are thus supplementary in the Hindu ecclesiastical system, both conduced to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge—the presiding element being the deity or idol in the one, the learned and pious ascetic in the other. The position of the head of the *mull* is thus not the same as or analogous to that of managers or *dharma-kartas* of *devastanams* and temples, but resembles more that of Bishops and Archbishops in the Christian system of Europe. In the case of temples, the endowments, whether in the shape of landed property or *tasidik* allowances, have to be devoted to the carrying out of the specific purposes connected with the temple, *i. e.*, the daily worship and the periodical ceremonies and festival—purposes defined and settled by usage and custom and generally recorded in what is known as the 'dittam'—and the *dharma-kartas* are mere trustees for the carrying out, or executing such trusts. In the case of *mults*, however, such defined and specific purposes immediately connected with the maintenance of the *mull* as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the *mull* as well as from the money-offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the *mull* for the time being, which he is expected to spend at his will and pleasure, on objects of religious charity.

²¹ *Prasanna Kumari Debia v. Golubchand Baboo* 2 I. A. 145 (1875). See also *Maharani Sibeswar Debia v. Mothooranath*

Acharjo 13 Moo. I. A. 270 (1869); *Manohor Ganesh Tambekar v. Lakhmiram Govindram* 12 Bom. 247 (1887).

and in the encouragement and promotion of religious learning."¹

Lands dedicated to the services of an idol being inalienable, a *shebait* cannot alienate them, though he can create derivative tenures and estates conformable to usage.² *Shebaits* who succeed one another from a continuing representation of the *devutler* property, can incur debts for the proper expenses of keeping up the religious worship, repairing the temple, &c. Judgments obtained against a *shebait* in respect of such debts are binding upon succeeding *shebaits*, though the decrees could be executed only against the current rents and profits of the *devutler* property. The Privy Council has laid down a rule relating to the powers of a *shebait* in these terms:—"Notwithstanding that property devoted to religious purposes, is, as a rule, inalienable, it is in their Lordships' opinion competent for the *shebait* of the property dedicated to the worship of an idol, in the capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples and other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them."³ The Bombay Court following this decision of the Privy Council has laid down that religious endowments in this country, whether Hindu or Mahomedan, are not alienable, though the annual revenues of such endowments, as distinguished from the *corpus*, may occasionally be pledged for purposes essential to the Institution endowed.⁴

Power of
shebait or
manager.

¹ 27 Mad. 435 p. 454.

Adhikaree 22 Cal. 989; *Sheo*

² *Maharanee Shibessouree Debia v. Mothooranath Acharya* 13 Moo. I. A. 270 (1869).

Shankar v. Ram Shevak 24 Cal. 77 (1896).

³ *Prosunno Kumari Debia v. Golap Chand Baboo* 2 I. A. 145 (1875). See also *Prosunno Kumar Adhikaree v. Sarodin Prosunno*

Narayan v. Sudanand Ramchandra 5 Bom. 393 (1881). See also *Rupa Jagshet v. Krishnaji Gocind* 9 Bom. 169 (1884); *Collector of Thanna v. Hari Sitaram* 6

In *Trimbak Ramkrishna Ranade v. Lakshman Ramkrishna Ranade*,¹ it was laid down that "as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing parties entitled to share to officiate by turns and of allowing alienation within certain restrictions."

Rights of a
Mohunt of a
mutt.

As to the rights of the *Mohunts* or *Swamis* in relation to the *mutts* and their endowments, the cardinal principle is that the properties given for the maintenance of charities, religious or otherwise, are ordinarily inalienable.² But, "the *Swamis*," says Mr. Justice Subrahmania Ayyar, "were not mere employees or subordinates in the institutions, but heads thereof, whose duty it was to promote learning and further the interests of religion; such heads moreover as ascetics, not prone to be affected by motives incident to worldly life, requiring less restraint in dealing with property than ordinary men. It followed therefore that the law gave them, over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the *corpus* it treated the individuals composing the line of succession as in the position of tenants for life."³ In *Khusalchand v. Mahadurgiri*⁴ it was laid down that a grant to a *Goswami* and his disciples in perpetual succession, coupled with directions which practically make it an endowment of a *mutt* with a limitation of the enjoyment to a particular line of celebrants of the worship, does not entitle an individual *goswami* to encumber the endowment beyond his own life.

Bom. 546 (1882) : *Mancharam v. Pranshanker* 6 Bom. 298 (1882) ; *Shri Ganesh v. Keshavar* 15 Bom. 625 (1890) ; *Ramchunder v. Kashinath* 19 Bom. 271 (1894).

¹ 20 Bom. 495 (1895).

² *Maharani Shobeswar Debi v. Mothoora Nath Acharya* 13 Mys. I. A. 270 (1869) ; *Prasanna*

Kumari Debia v. Golabchand Baboo 2. I.A. 145 (1875) ; *Narayan v. Chintamon* 5 Bom. 393 (1881) ; *Collector of Thanna v. Hari Sitaram* 6 Bom. 546 (1882).

³ *Vidyapurna Tirtha Swami v. Vidyunidhi Tirtha Swami*, 27 Mad. 435 p. 439. (1904).

⁴ 12 Bom. H. C. B. 214 (1875).

A *Mohunt* in charge of an endowment, with only a life interest in the property, cannot create an interest superior to his own, or, except under the most extraordinary pressure and for the distinct benefit of the endowment, bind his successors in office. If a purchaser from such *Mohunt* retained possession after the *Mohunt's* death, the successor to the *gali* would have a cause of action against him from the date of the election; and no length of possession during the vendor's life-time would give the purchaser a valid title as against the present *Mohunt*.¹ If this were not so, any *Mohunt* who was inclined to commit waste on an endowment and who lived long enough, might ruin the property entrusted to his charge, and leave his successor remedyless if more than 12 years had elapsed since the alienations.

The right of succession to the property of a deceased *Mohunt* depends upon the custom and practice of the particular institution concerned.² The *chelos* cannot claim the property of the deceased *guru* whether hereditary or self-acquired, by right of inheritance, nor can they claim a division of the same among themselves.³ The custom and usage governing succession of each institution must be

Right of succession to a *mohuntee*.

¹ *Mohunt Burn Suroop Dass v. Khashee Jha* 20 W.R. 471 (1873). See also the following cases:— *Narayan v. Sudanand Ramchandra* 5 Bom. 393 (1881); *Collector of Thanna v. Hari Sitaram*, 6 Bom. 546 (1882); *Dhuranidhur Maharajee v. Keskarrao Gorind Kulgavkar*, 15 Bom. 625 (1890); *Sitarambhat v. Sitaram Ganesh*, 6 Bom. H. C. R. 250 (1869); *Maharanee Shobeswarree Debia v. Mothooranath Acharje*, 13 Moo. I. A. 270 (1869); *Prosunna Kumari Debyaa v. Golub Chand Baboo*, 2 I. A. 115 (1875); *Kouwar Doorganath Ray*

v. *Ram Chunder Sen*, 4 I. A. 52 (1876); *Ramalingam Pillai v. Vythilingum Pillai*, 20 I. A. 150 (1893) s. c. 16 Mad. 490; *Parsutam Gir v. Dat Gir*, 25 All. 296 (1903); *Saminatha v. Purushottama*, 16 Mad. 67 (1892); *Kusim Saiba v. Sudhindra Thirtha Swami*, 18 Mad. 359 (1895).

² *Greedharee Doss v. Nundikisse* 11 Moo. I. A. 405 (1867); s. c. in Cal. H.C. 2 Hay 633 (1863); s. c. 1 Marshal 573.

³ *Atmanund v. Atma Ram* 1 N.W.P. Decis 309 (1852),

strictly proved.¹ If by usage the office of a *Mohunt* is elective, it must be adhered to in preference to any other mode of succession. Any devise or relinquishment by the incumbent in favour of another person, in opposition to the usage of the institution cannot operate at all.²

Rules of
succession to
a *mutt*.

The rule regarding succession to a *mohuntship* of a *mutt* as laid down in various decided cases, the earliest of which came before the Sudder Dewany Adawlut in 1806, is as follows :—According to the established usage a successor to the office of a *Mohunt* is nominated by the last incumbent, who, in his capacity of *guru* or spiritual teacher, selects one of his *chelas* or pupils to succeed him at his decease. On the demise of the *Mohunt*, the *Mohunts* of other similar institutions in the vicinage convene an assembly of the order for performing the *bundhara* or funeral obsequies of the deceased *Mohunt*, at which they confirm the nomination made by the deceased and initiate the pupil selected as his authorized successor.³

Khaschela to
succeed where
no nomina-
tion made.

The foregoing rule for the election of a successor by the *Mohunt* during life and his subsequent installation by an assembly of *Mohunts* at the obsequies of the deceased *Mohunt* appears to be in all cases indisputable and conclusive. But the case of *Ganesh Gir v. Amrao Gir*⁴ has laid down a precedent that where no successor has been nominated by the last incumbent, the proper successor is his

¹ *Greedharjee Doss v. Nando Kissare* 11 Moo. I. A. 405 (1867); *Raja Mutta Ramalinga Setupati v. Perianayagam*, 1. I. A. 209 (1874); *Rajah Vurmah Valia v. Rari Vurmah Mutha*, 4 I. A. 83 (1876); *Srimati Jaunki Debi v. Sri Gopal Acharya* 10 I.A. 32 (1882); *Genda Puri v. Chitar Puri* 13 I. A. 100 (1886); s. c. 9 All. 1; *Ramalingam Pillai v. Vytilingam Pillai* 20 I.A. 150 (1893); s. c. 16 Mad. 490.

² *Narain Das v. Brindaban Das*

2 S.D. Sel. Rep. 151 (1815).

³ *Dhunising Gir v. Mya Gir* 1 S. D. Sel. Rep. 153 (1806); *Ramruttun Das v. Bunnalee Das* Ibid 170 (1806); *Ganesh Gir v. Amrao Gir* Ibid 218 (291) [1807]; *Gunga Das v. Tiluk Das* Ibid 309 (1810); *Narain Das v. Brindabun Das* 2 S. D. Sel. Rep. 151 (1815); *Atmanund v. Atma Ram* 1 N. W. P. Decis 309 (1852); *Sitapershad v. Thakurdass* 5 C. L. R. 73. (1879).

⁴ 1 S. D. Sel. Rep. 218 (1807).

Khaschela or principal pupil. A *Mohunt*, being restricted from marriage, can have no legitimate children and must be succeeded in his rights and possession by his *chela* or adopted pupil. Nomination of a successor by the *Mohunt* incumbent may be made either by word of mouth or by will.¹

It would seem that nomination of a successor by a deceased *Mohunt* must be confirmed by other *Mohunts* of the order and the *Mohunt* elect must be duly installed by them in the *gadi* at the *bundhara* ceremony. In a case where there was no regular election or installation as required by the usage of the sect, the Sudder Dewany Adawlut directed the *Mohunt* in possession to convene an assembly of *Mohunts* to elect and instal him regularly.² In the *Ganes Gir's* case³ the claimant, who was the principal pupil, was duly installed as the successor of the deceased *Mohunt* at his obsequies by an assembly of the *Mohunts*. So the judgment was given in his favour. In another case the Sudder Dewany Adawlut, in rejecting a claim for the superintendence of an endowment, observed as follows :— “But a further objection arises to the plaintiff's claim, viz., that were the deed established and were it shown that it was the intention of the donor to transfer to the donee his rights of office as well as personal rights, and also the duties incumbent on the office of *Mohunt*, there has been no acknowledgment of the Plaintiff by the assembly of *Mohunts* and others in due form, as is proved in the record to be customary on the death of one *Mohunt* and the appointment of his successor.”⁴

Nomination
to be confirm-
ed : Installa-
tion essential.

Greedharee Dass v. Nundo-
kissore Dass 11 Moo. I. A. 406
(1867); *Trimbakpuri Guru Sital*
puri v. Gangabai, 11 Bom. 514
(1887); *Ramalingam Pillai v.*
Vythilingam Pillai, 20 I. A. 150
(1893); s. c. 16 Mad. 490; *Genda*
Puri v. Chhatar Puri 13 I. A. 100

(1886): s. c. 9 All. 1.
Gunga Das v. Tilak Das 1 S.
D. Sel. Rep. 309 (1810).
• I. S. D Sel. Rep. 218 (1807).
* *Mohunt Gopal Dass v. Mohunt*
Kirparam Dass 6 S. D. Decis.
250 (1850).

Bundhara assembly's power.

The *bundhara* assembly has full power either to confirm or to set aside the nomination made by the deceased *Mohunt*. If the assembly see reason for setting aside the nomination or if no successor has been nominated by the deceased, in either of which cases they make an election of their own, selecting from among the pupils of the deceased the one who may appear to be the best qualified to be his successor and then to instal him in the *gadi* with the usual ceremonies.¹

Usage of each *mohnutee* is its law of succession.

With reference to rules of succession to the *gadi* Sir Barnes Peacock C. J., in *Greedharee Dass v. Nund Kishore Dutt* said :—“Numerous cases have been cited to show what was the usage, but the law to be laid down by this court must be as to what is the usage of each *mohnutee*. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession ; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *mohnutee*.² The Judicial Committee on the appeal of the same case said, “It is to be observed that the only law as to these *Mohunts* and their office, functions and duties, is to be found in custom and practice, which is to be proved by testimony.”³ The same principle has been laid down in various other cases by different courts in India as well as by the Judicial Committee.⁴

¹ *Gunga Das v. Tiluk Das* 1 S. D. Sel. Rep. 309 (1810); *Atmanund v. Atmaram* 1 N. W. P. Decis 309 (1852).

² 1 Marshal 573 p. 581 (1863) : s. c. 2 Hay 633 ;

³ *Greedharee Dass v. Nundo-kissore Dass* 11 Moo. I. A. 405 (1867). See also similar observations of Garth c. j., in *Sitapur-ghad Thakurdass* 5, C. L. R. 73

p. 79 (1879).

⁴ *Raja Muttu Ramalinga Setupati v. Perianayagum Pillai* 1 I. A. 209 (1874) ; *Raja Vurmah Valia v. Raci Vurma Mulha* 1 I. A. 76 (1876) : s. c. 1 Mad. 235 : *Srinati Janaki Devi v. Sri Gopal Acharya* 10 I. A. 32 (1882) s. c. in the lower court 2 Cal. 365 ; *Genda Puri v. Chhatar Puri* 13 I. A. 100 (1886) ; s. c. 9 All. 1 :

A suit by the *chela* of a *Sravuk guru* to obtain possession of the temple of his sect at Surat in quality of heir to the last *guru* was dismissed because the *seth* of the sect of Ahmedabad was possessed of the sole power to nominate a *guru* and had already appointed another person.¹

Sravuk guru
succession.

Land bestowed by a zemindar in perpetuity upon a *Gosain* escheats on the death of the donee without legal heirs, together with any buildings or groves standing thereon, to the ruling power, and does not revert to the donor.²

Escheat.

According to Hindu law a *chela* is the heir and personal representative of the deceased *Mohunt*.³ So the *chela* (spiritual son) and not the *gurubhai* (spiritual brother) of the deceased *Mohunt* is entitled to collect the outstanding debts due to his private estates.⁴ On an application for Letters of Administration to the estate of a deceased *Bairagee*, it was held that according to the custom prevalent amongst the sect the preceptor of the deceased *Mohunt's* preceptor was entitled to it. This custom supersedes the Hindu law which contemplates the succession only of the preceptor himself.⁵ Whether this custom, which ignored the right of the preceptor to inherit the property of the disciple, was unreasonable or not, Banerjee J., said : "But that of itself does not make the custom so unreasonable that we should refuse to recognize it. It may be well (and some of the facts appearing from certain of the documents go to show that is so) that by reason

Legal repre-
sentative of a
mohunt

Ramalingam Pillai v. Vythilingam Pillai 20 I. A. 150 (1890); s. c. 16 Mad. 490; *Basdeo v. Gharib Das* 13 All. 256 (1890).

Mohunt Joyram Dass 5 W. R. Misc. 57 (1866); s. c. 2 Wyman Part 18.

¹ *Bhutaruk Rajendra Sajigur Sowree v. Sook Sugur* 1 Borr. 390 (1809).

² *Dukharam Bharti v. Luchman Bharti* 4 Cal. 954 (1879); s. c. 4 Shom, Notes 5; See also *Bhyrub Bharati Mohunt* 21 W. R. 310 (1874).

³ *Sungram Singh v. Debee Dutt* 2 N. W. P. Decis. Sel. Rep. 235 (1855).

⁴ See *Dayabhaga* Ch. XI. s. 6. para. 35.

⁵ *Mohunt Sheoprokash Das v.*

of superior sanctity attaching to the family, to which the applicant belongs, the right to succeed has been conceded to the members of that family in preference to the right of the immediate preceptors of the deceased disciples.”¹

A *chela* alone entitled to succeed.

Primarily no person except a *chela* or disciple is entitled to succeed to a deceased *mohunt*. The *chela* must be an ascetic and follow a life of celibacy.² Where there are more *chelus* than one, custom and practice intervene. Sometimes the eldest or *khascela* succeeds to the *gadi* by right of primogeniture. In some cases the *guru* selects or nominates his successor from amongst his *chelas*. In some *Asthals* the succession depends upon election from amongst the *chelas* by the superiors of other similar *Asthals*. The reigning king has occasionally the right to elect from amongst the *chelas* of the last *Mohnut*.³ In a very recent Madras case, one of the learned Judges has thus put the law of succession to *mutts* in Southern India :—“It is regulated in the case of *mutts* by the custom or usage of each particular *mutt*, but in most cases, especially in Southern India, the successor is ordained and appointed by the head of the *mutt* during his own life-time and in default of such appointment the nomination may rest with the head of some kindred institution, or the successor may be appointed by election by the disciples and followers of the *mutt*, or, in the last instance, by the Court as representing the Sovereign.”⁴

In default of
chela a *gurubhai* or some
other spiritual
relation.

When the last *Mohnut* dies without leaving any *chela* the succession goes to the *gurubhai* or some other spiritual relation according to the usage and custom of the institution. In *Ram Dass Bairagee v. Gunga Dass*,⁵ the *Mohnut* of a *bairagee* *mutt* died without leaving any *chela*.

¹ *The Collector of Dacca v. Jagat Chunder Goswami* 28 Cal. 608 p. 611 (1901); s. c. 5 C. W. N. 873.

² *Mohnut Ramji Dass v. Lachhu Dass* 7 C. W. N. 145 (1902).

³ *Ibid.*

⁴ *Vidyapurna Tirtha Swami v. Vidyapurna Tirtha Swami* 27 Mad. 435 p. 457. (1904)

⁵ 3 Ag. H.C. 295 (1868).

Ordinarily a successor to this *mutt* is appointed by the *mohunts* of other *bairagee mutts*. But a custom was set up to the effect that the property of a deceased *mohunt* leaving no *chela* passed to the *brother* of his spiritual preceptor. The Court directed inquiry into the alleged custom. In *Mohunt Bhagaban Ramannj Das v. Mohunt Raghunundan Ramannj Dass*¹ the rule of succession to a *mutt* in Puri, called *Dakhinparsa*, was proved to be as follows:—The *Mohunt* had power to select his successor from amongst his *chelas*; that in the absence of appointment, a *chela* succeeds; if more than one *chela*, the eldest; and in the absence of a *chela*, the *mohunt's gurubhai* or *co-chela* i.e. the *chela* of the predecessor of the deceased *mohunt*) succeeds.

A *Mohunt* by his Will may appoint his spiritual brother to be his successor.²

If a *Mohunt* is found guilty of crimes or misconduct he may be removed from the office.³ The *Mohunt* of a temple is not liable to dismissal at the instance of the Advocate-General, when no cause of misconduct has been established against him.⁴

A *Swami* or head of a *mutt* who is not mere a trustee does not (in the absence of evidence of custom to the contrary) forfeit his position by reason of his having become a lunatic. Under the Hindu law itself, lunacy does not operate to divest a right already acquired.⁵

If leprosy is relied upon as disqualifying a *Mohunt* from adopting a *chela*, it must be shewn to have been of a virulent form.⁶

¹ 22 I. A. 91 (1895) : s. c. 22 Cal. 843.

² *Greedharjee Dass v. Nundkissoore Dutt Mohunt*, 1 Marshal 573 (1863).

³ *Bhoobun Mohun Deb v. Bikram Deb* 6 Beng. Sel. Rep. 387 (1850); *Berjaye Gorind Burrall Kalee Das*, Ibid 447 (1850).

⁴ *Dhuncocerhai v. The Advocate-General* 1 Bom. L. R. 743 (1899). See *Prayag Dass Jiraru v. Pirumala* 30 Mad. 138 (p. c.) [1907].

⁵ *Vidyapurna Tirtha Swami v. Vidyanihi Tirtha Swami* 27 Mad. 435 (1903).

⁶ *Mohunt Bhagaban v. Mohunt*

Removal of a
mohunt.

Lunacy.

Leprosy.

Succession to
Vaishnava akharas and
Shivite mutts.

Vaishnava akharas and *Shivite mutts* are no doubt religious institutions of a public character. But as in some of these the *mohunts* are householders and allowed to marry, the succession to the *gadi* of these is generally governed by the ordinary Hindu law. Where the *mohunts* are married and their children succeed to the *gadi* as heirs, it is difficult to say then whether those *mutts* are public *devulter* property or otherwise.

Succession to
religious trust
properties.

The devolution of the office of *shebait* or manager is regulated by the terms upon which the trust was created, or the usage of each particular institution where no express trust-deed exists. Where no terms are mentioned in the grant, the *shebaitship* devolves upon the legal heirs of the founder.¹ When the worship of a *thakur* has been founded, the office of a *shebait* is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing or circumstances, showing different mode of devolution.² Where a *shebait* does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder.³

Raghunandan 22 I. A. 91 (1895) : s. c. 22 Cal 843.

E Peet Koonwar v. Chuttur Dbaree Singh 13 W. R. 396 (1870); *Srimati Janaki Debi v. Sri Gopal Acharya* 10 I. A. 32 (1882); s. c. 9 Cal. 766; *Jagannath Prasad Gupta v. Ranjit Singh*, 25 Cal. 354 p. 369 (1897). *Gossamee Sree Greedharejee v. Rumantolljee*, 16 I.A. 137 (1889); s. c. 17 Cal. 3.

Jagadindra Nath Roy v. Hementa Kumari Debi 32 Cal. 129 (1901) : s. c. 8 C. W. N. 809; *Gossamee Sree Greedharejee v. Rumantolljee*, 16 I. A. 137 (1889) s. c. 17 Cal 3; *Jagannath Prasad Gupta v. Ranjit Singh*, 25 Cal. 354 (1897); s. c. 23 Mad. 271;

Jai Banshi Kunwar v. Chattardhari Singh 5 B. L. R. 181 (1870); s. c. 13 W. R. 396; *Gossamee Sree Greedharejee v. Rumantolljee*, 16 I. A. 137 (1889) s. c. 17

Jai Banshi Kunwar v. Chattardhari Singh 5 B. L. R. 181 (1870); s. c. 13 W. R. 396; *Gossamee Sree Greedharejee v. Rumantolljee*, 16 I. A. 137 (1889) s. c. 17 Cal 3; *Jagannath Prasad Gupta v. Ranjit Singh*, 25 Cal. 354 (1897).

Where the *mutrallee* of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property.¹ Where a testator had made a bequest for charitable purposes, and had made no express provision for the management of the charitable trust so created, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust fund, the Civil Court should take the fund and the management of the trust summarily in its own hand, it was held that in the absence of misconduct, the widow, and not the Collector, was the proper person to be appointed trustee.²

The Privy Council in a very recent case (which came from Calcutta) has laid down that in cases where there is no evidence as to who founded a religious endowment, or as to the terms or conditions of the foundation, the legal inference is that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder.³

In *Joydeb Surmah v. Hurroputty Surmah*⁴ the question for decision was whether a female can succeed to the office of *dolloi* (*i.e.* priest) of a temple. Hindu text-writers⁵ say that a priestly office cannot be performed by a woman. The Court, however, remanded the case for, amongst other reasons, a finding on the point as to whether there was any custom or rule of Hindu law by which a woman is entitled to succeed in the priestly office. In *Mujavar Ibrahim Bibi v. Mujavar Hussain Sheriff*⁶ it has been laid down that a woman is not competent to perform the duties of *Mujavar* (manager) of a

Succession
by woman
as trustee.

¹ *Pert Kooncar v. Chittur-dharce Singh* 13 W. R. 396 (1870).

² *Hari Dasi Dube v. The Secretary of State for India in Council* 5 Cal. 228 (1879).

³ *Maharaju Jagadindranath v.*

Rani Hemanta Kumari, 32 Cal. 129 (P. C.) [1904].

⁴ 16 W. R. 282 (1871).

⁵ *Vide Colebrooke's Digest.*

⁶ 3 Mad. 95 (1880).

durga which are not of a secular nature. In *Hari Dasi Devi*¹ it was held that a widow can be appointed trustee of some charitable trust. But this, the Court held, was in accordance with the terms of the Will of the testator, as there was no direction whatever that the Government should take control on the failure of Hari Dasi's line, but only that the estate should go to Government in the event of her being disqualified, i.e., "if her decease occurs before she brings forth a son, or she be (when the succession falls in) barren (*avira*), or otherwise disqualified, then my whole estate shall go to the Government." Of course her appointment as trustee was subject to removal in case of misconduct or negligence.

In *Srimati Janoki Debi v. Sri Gopal Acharjia*² the plaintiff, a Hindu widow, claimed to succeed to the *shebaitship* in question with possession of the *devultur* properties in dispute by right of inheritance as widow and heiress of the last *shebait*. It was found in this case that the succession was not according to Hindu law, that there was great difficulty in ascertaining what was the rule of succession to this office, but it was certain that the usage had not been according to the ordinary rules of inheritance of Hindu law. The Privy Council observed that "not only does the usage not support the plaintiff's claim but it is opposed to it" and dismissed the appeal.

Succession to
mutts in
Cuttack.

There seemed to be three descriptions of *mutts* in Cuttack viz., *Monrosi*, *Punchaiti* and *Hakimi*. In the first, the office of chief *Mohunt* was hereditary and devolved upon the chief disciple of the existing *Mohunt*, who, moreover, usually nominated him as his successor. In the second, the office was elective, the presiding *Mohunt* being selected by an assembly of *Mohunts*. In the third, the appointment of presiding *Mohunt* was vested in the

ruling power, or in the party who endowed the temple.¹ In *Mohunt Rama Nooj Doss v. Mohunt Debraj Doss*² the plaintiff claimed the office of presiding *Mohunt* of a temple at Juggurnath on the grounds of his having been principal *chela* of the late *Mohunt*, of his having been nominated by the latter to the succession, and of the nomination having been adhered to by the appointing *Mohunt* during the latter years of his life. The *mohuntee* under litigation was found to be *mourasi*. The Court decided in favour of the plaintiff against the defendant who based his claim on a prior nomination to the succession by the presiding *Mohunt* and a deed of gift, in his favour, of the temple and its appenages.

In the case of a *mourasi mutt* the investiture by the leading neighbouring *Mohunts* at the *bundhara* ceremony of one who cannot prove that he was actually appointed by the last *Mohunt*, is not sufficient, in the absence of proof that he has no right to be so appointed as being senior *chela* of the last *Mohunt*, to entitle him to succeed to the *gadi*.³

The rule of succession to the office of *Geer* is very much like that of a *mutt*. It seems that in accordance with the immemorial custom the *Geer* for the time being nominated his successor. Failing such nomination the disciples assemble at the place where he died, elect his successor and the person so nominated becomes *Geer* by virtue of such nomination. He must be initiated and become a *sanyasi*, otherwise he cannot be entitled to the rights and privileges of *Geer*. The essence of initiation consists in the person initiated repeating the *presha* or *sannyasa mantram* as it is pronounced by the *Geer* who nominates him. The text of the *presha mantram*

Rule of suc-
cession to the
office of *Geer*.

¹ *Mohunt Rama Nooj Doss v. Bom. L. R.* 743 p. 748 (1899).

Mohunt Debraj Doss G. S. D. Sel. Rep. 262 p. 268 (1839). This case was referred to in *Dhuncoover v. C. L. R.* 73 (1879).

bui v. The Advocate-General 1

² 6 S. D. Sel. Rep. 262 (1839).

³ *Sitapershad v. Thakurdass* 5

as given in the *Diskshitiyam* means 'I hereby renounce love of children, of wealth, and of the world'; and when time and circumstances permit, it is uttered whilst going through the ritual prescribed for becoming *sannyasi* and after performing certain preliminary ceremonies, one of which consists in *jeeva-sraddham* whereby the person becoming a *sannyasi* is required to perform his own *sraddha* or death ceremony and thereby determine his *status* as a *grihastha* or house-holder, or, in legal phraseology, to suffer civil death in relation to his natural family. He receives *upadesam* if made in the regular mode, after performing *jeeva-sraddham* and by pronouncing the *presha mantram*.¹ Having regard to the intention with which the *upadesam* is made the repetition of the *upadesa mantram* by the disciple was of its essence, otherwise he could not have become the disciple of the late *Geer*. So where a plaintiff alleged that he was nominated by the late *Geer*, although the nomination was not concurred in by the disciples, and that he was directed to become a *sannyasi* a day or two after his initiation but did not become so; the Court held that on its appearing that the plaintiff did not repeat the *presha mantram* his *upadesam* was insufficient, and that as he did not become a *sannyasi* soon after the alleged initiation his right, if any, to the *status* of *Geer* ceased on his omission to do so.²

Office of
Dharmakarta
at Rames-
waram.

Regarding the rights of succession to the office of a *Dharmakarta*, or trustee, of a *devasthanam*, or temple, at Rameswaram in Madura, the only law applicable is the custom and practice which are to be proved by evidence. The temple is one of the class of religious institutions described in section 4 of Act XX of 1863. And according to immemorial usage the *dharmakarta* should be a *Vellala pandaram*, i. e., an ascetic of the *Vellala* caste. According to the established usage of the religious founda-

¹ *Rangachariar v. Yegna Dikshitar* 13 Mad. 524 p. 543 (1890). ² *Rangachariar v. Yegna Dikshitar* 13 Mad. 524 (1890).

tion, each *dharma-karta* initiates a Vellala layman and makes him an ascetic and thereafter appoints him as his successor while in office and shortly before his death. It follows, therefore, that the appointment of a *dharma-karta* by one who has already ceased to hold the office will not be in accordance with the usage and will therefore be invalid.¹

A very curious custom relating to the appointment of a *Swami* or head of a *mutt* was alleged in a very recent Madras case.² There the allegation of the plaintiff was that the two *mutts*, viz., *Bhandarkare* and *Bhimasalu*, were *dwividva*, i. e., interdependent *mutts*, and that therefore, the *Swami* of each was entitled to appoint the other, in the event of the *Swami* of either dying without having appointed and leaving a successor, or a vacancy occurring. But the Court did not go into the question as to whether the head of the *mutt* had such power to appoint as claimed by the plaintiff. The case was disposed of on the ground that as there was no vacancy no appointment could be made. For, it would seem, the *Swami* who was adjudged a lunatic was alive when the plaintiff was appointed and lunacy does not operate as a forfeiture of the acquired rights.

*Dicundra
mutts in
South Canara.*

Religious offices, as a rule, cannot be the subject of sale. The office is *res extra commercium* and no trustee or *shebaat* has power to transfer or sell it for pecuniary consideration. Whether by custom of any particular institution such alienation would be valid is a matter worth consideration. In a Madras case³ the High Court did not go into the question, as the trustees of the temple did not appear in the Court of first appeal to raise the question of the malienability of the office. But the facts were

*Religious
office res
extra com-
m商量.*

¹ *Ramalingam Pillai v. Vythi* v. *Vidyanidhi Tirtha Swami* 27 *lingam Pillai* 16 Mad. 490 pp. 496, Mad. 435 (1903).

497 (P.C.) [1893]. ² *Rangasami v. Ranuga* 16 Mad.

³ *Vidyapurna Tirtha Swami* 146 (1892).

these : the plaintiff sued for a declaration of his title as holder of a *mirasi* office in a certain temple under a sale-deed, by which the office and its emoluments were assigned to him by the first defendant. The second defendant claimed title to the office by purchase : other defendants were the trustees of the temple. The Court of first instance passed a decree as prayed for, but it was reversed on an appeal by the second defendant alone ; the trustees did not appear on appeal. On second appeal, it was held that the second defendant was not entitled to a decree on the sole ground that the office was *res extra commercium*. As a matter of fact the second defendant himself admitted that the office was saleable, and the first defendant, who sold the office to the plaintiff, acquired his right to it by purchase. It is, therefore, beyond all doubt, that the office in question is saleable and if so, that must be by custom attached to the institution. But supposing that such custom of sale of the office was established, would the alienation be valid ? In this connection let us consider what the Privy Council said in *Rajah Vurmah Valia v. Rari Vurma Mutha*.¹ There the point for determination was whether the *uraima* right, or the right of management of a *pagoda*, was transferable by custom. A certain Rajah (in Tellichery) claimed to be the assignee of the *uraima* right of certain *pagoda* and its subordinate *chelrons* under an assignment from the *urallers* (trustees or managers) of the religious foundation. The *urallers* had no power under what may be called the common Law of India to transfer the *uraima* right to the Rajah, who relied on the custom of the institution sanctioning such assignment. The Privy Council held that "no custom which can qualify the general principle of law has been established in this case, and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case, the sale

of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that circumstance alone would justify a decision that the custom was bad in law." In view of this observation of their Lordships and on the broad ground of public policy, the sale of religious offices even by the custom of the institution should not be permitted. Apart from the question of public policy, since such alienation may render the object of the founder futile or frustrate the same altogether, any custom or usage sanctioning such alienation should certainly be regarded as bad or as an illegal custom, and must not be permitted to operate against or qualify the general principle of law. In *Gnanasambanda Pandara Sannadhi v. Veln Pandaram*¹ where the hereditary trustees of a religious endowment sold their hereditary right of management and transferred the endowed property, the Judicial Committee held that the sales were null and void, in the absence of custom allowing them. The Judicial Committee referred to *Rajah Furmah's* case but did not discuss whether such a custom would be valid.

Priestly office may be hereditary, and succession thereto is chiefly confined to the male line. In default of males, however, females may succeed.² Like the office of a *shebait*, a priestly office with emoluments attached to it is also inalienable, and it would be contrary to public policy to allow offices like this to be transferred either by private sale or by sale in execution of a decree.³ A person is not precluded from raising the question that his priestly office with emoluments are inalienable, because he mortgaged the same.⁴ It has, however, been held that the right to perform worship carrying emoluments with it, is property subject to partition.⁵

Priestly office.

¹ 27 I. A. 69 (1898).

493 (1897).

² *Sitarambhat v. Sitaram Ganesh*, 6 Bom. H. C. R. 250 (1869).

⁴ Ibid

³ *Srimati Mallika Dasi v. Ratnamani Chakravarti*, 1 C. W. N.

⁵ *Mitta Kunth Audhicary v. Neerunjun Audhicary*, 14 B. L. R. 166 (1874), s.c. 22 W. R. 437.

Brahma-
*charee and his
nephew.*

In *Sheoram Brahmacharee v. Subsookh Brahmacharee*,¹ it was held that the nephew of a deceased *Brahmacharee*, appointed to succeed him in the *gadi* of a religious endowment had a superior title to a *chela* in possession. It was found that the late *Brahmacharee* and his nephew belonged to the same tribe and country and that the former intended that the latter should succeed to the *gadi* on his death. The nephew being away on a pilgrimage to Juggernath his uncle died, and the *chela*, who was in no way related to the deceased, performed his funeral ceremonies and took possession of the *gadi*. The Court decided in favour of the nephew on no less than twelve solid reasons.

*Bairagee and
his successor.*

A *Bairagee* is not necessarily such a religious devotee that his goods are inherited by his pupil in the event of intestacy.² The goods of a *Yati* are inherited by his *sishya* and not by his *chela*.³ In *Gopaldas Kishandas v. Damodhar*,⁴ in which the alienation of a *mandeer* by one of the six *chelas* of a *bairagee guru* without the concurrence of them all, was declared illegal, the court said : "It was an old and unalterable rule among *bairagees* that the *chelas* were joint heirs to the *mandeer* and had an equal interest in it, so that one alone could not alienate it without the consent of all." A person having become a *bairagee*, but retained the style and title of Rajah, and mixed in worldly affair and continued with his family, was held not to have become an ascetic or religious devotee, to such an extent as to exclude his adopted son from succeeding to his property, whether acquired before or after his becoming a *bairagee*.⁵

*Principle of
succession
among ascet-
ics.*

The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely

¹ S. S. D. Sel. Rep. 477 (1824).

goods of Sittaram Dose, 2 Boulnois

² *Gobind Dass v. Ramsahoy*

8 (1859).

Jemadar, 1 Fulton 217 (1843).

³ *Mohunt Mudhoobun Dass v.*

⁴ *Ibid.*

Hurry Kishen Bhunj, 8 S. D.

⁵ 1 Borr, 439 (1812). See *In the*

Decis, 1089 (1852).

upon fellowship and personal association with that other, and a stranger, though of the same order, is excluded.¹

Devuttur lands are endowed lands for religious purposes. They are not hereditable property. But the management of them for religious uses devolves on the heirs of the person who made the endowment. The heirs may, by mutual consent, separate and form distinct religious endowments. But should one of the heirs sell the portion of the endowed land under his management, he cannot claim a share of the portion managed by the others.² Strictly speaking *devuttur* property is not divisible. The succession to the office of the *shebait* is regulated by the rules laid down by the founder. Where no such rules have been laid down, the management may be held by turns by the heirs.³ In a Madras case, however, it has been held that according to the usage, in the Tinnevelly district, the eldest male heir of a deceased trustee succeeds as trustee.⁴ This, according to the Hindu law, is the rule of succession to the office of a *shebait*, viz., by primogeniture.

The sect of *grihastha Gosains* living mostly in Hardwar, Dehra Dun and other adjacent places in the United Provinces belong to the order of *sannyasis* known as *Giris*. This order was founded by Sankaracharya in the eighth century of the Christian era. Originally the members of this order were supposed to renounce the world and were strictly ascetics. The wealth of the ascetic consisted of his stick, begging bowl and the like, and was invalu-

Devuttur lands.

Grihastha Gosains of Hardwar.

¹ *Khuggendur Narain Chowdhury v. Sharupgir Oghorenath*, 4 Cal. 543 (1878), s. c. 3 Shome 29 Notes. See also *Chhajju Gir v. Diwan*, 29 All. 109 (1906).

² *Elder Widow of Raja Chutter Sein, v. Younger Widow of Raja Chutter Sen* 1 S. D. Sel. Rep., 180 (1807).

³ *Nubakissen v. Harris Chunder* 2 Morley's Digest 146. *Mitta Kunth Audhicary v. Neerunjun Audhicary*, 14 B. L. R. 166 (1874); s. c. 22 W. R. 437; *Mancharam v. Pranshankur*, 6 Bom. 298 (1882).

⁴ *Purapparanalingam Chetti v. Nullasiran Chetti*, 1 Mad. H. C. R., 415 (1863).

able to his disciples. In course of time these bodies acquired wealth, and so far from practising habits of stern austerity took to habits of luxury and worldliness. A section of them married and became *grihastha* (house-holder) while the remainder observed celibacy and are known as *Nihangs*.¹ The *grihastha* *Gosains* are subject generally to Hindu Law.² Among the *Nihangs*, i.e., naked, free from care, as distinguished from *grihastha*, succession is governed by the special custom of the sect, i.e., in favour of the disciples of the *guru* and not of his heirs.³

In *Chhajau Gir v. Diwan*⁴ in which the parties belonged to the order of *Giris*, a sect of *grihastha gosains*, a custom was set up by virtue of which the widow of a deceased *gosain* was entitled, with the concurrence of the elders of the sect, to adopt a *chela* and successor to her deceased husband. But upon the evidence it was found that this novel custom was not substantiated.

Posthumous
chela.

In the above case the Court also made certain observations with reference to a posthumous *chela*. The authority that a posthumous disciple may be appointed to a deceased ascetic may be found in West and Bühler's Hindu Law.⁵ There, in answer to the question whether a *Gosain*, either of the sect *Puri*, *Giri* or *Bharathi* acquired a *vatan* like that of a *Patil* or *Kulkarni*, can it descend to his or his wife's disciple, the reply is:—"Among the *Gosains* of the above-mentioned sects, a disciple is as good an heir as a son among other people. If a disciple was not nominated by the male *Gosain* his wife may nominate one to succeed to her estate in the same manner as a widow among other classes is allowed to adopt a son." The

¹ *Chhajau Gir v. Diwan* 29 All. (1901).

109 p. 111 (1906); see also *Basdeo*

v. *Gharib Das*, 13 All. 256 p. 259

(1890);

² *Collector of Dacca v. Jagat Chunder Gosain* 28 Cal. 608

³ *Mohunt Gajraj Puri v. Ach-*

bar Puri 21 I. A. 17 (1898).

⁴ 29 All. 109 (1906).

⁵ See Vol. I, p. 565.

Court, however, said that the authority cited by the Pundits in support of this answer did not bear out the alleged practice. Moreover the answer would aim to presuppose that the deceased *gosain* for whom his wife may nominate a *chela* to succeed him had disciples, and that it was one of these disciples whom she might nominate as his successor. A person who has had no association with a spiritual guide cannot, except by a fiction, be his *chela*. A posthumous *chela* is a contradiction in terms.¹

In Bombay there is a class of *gosains*, called *gharbari Gosains*, who are competent to contract valid marriage.²

Vaishnavite gurus are, as a rule, house-holders and so are the *Shivites*. A *Mohunt* of a *vaishnavite akhara*, or of a *shivite mutt* may marry. And the ordinary Hindu law of inheritance governs the succession to these institutions.

The expressions *Dasname Sannyasi* and *Gosavi Zundivale* do not indicate individuals. They indicate a group or community of *sannyasis* or *gosains*.³ In Steele's *Hindu Law and Customs* there is an appendix which deals with the custom of *Gosains*, and it is there said that "all questions relating to the internal administration and discipline of the order are decided by an assembly called the *Dasname* which should consist of the disciples of the ten founders from whom they take their name." A grant to *dasname sannyasi* or *gosain zundivale* is a grant to an assembly or community of *sannyasis*, or to a group or community of *gosains*, and not any particular individuals as such.

Dasname Sannyasi and Gosavi Zundivale.

The law of the country recognizes fluctuating communities as legal *personæ* capable of owning property, as for instance, the caste, the village. *Dasname Sannaysis* and *Gosavi Zundivale* are similar communities composed of the religious elements their names indicate. A corporate body

¹ 29 All. 115.

² Steele's *Hindu Law and Cus.*

³ *Gitbai v. Shirbahas Gir* 5 *toms.* p. 435,
Bom. L. R. 318 (1903).

is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. On the dissolution of the corporations the cause of the grant fails and the effect of a dissolution on the corporation's rent-charges is that they become extinguished. As in the case of the death of a grantee of an annual payment out of land to last during the term of his life, the payment sinks into land on its determination, so where a grantee is a community and the grant is to last during the term of its existence, on its dissolution a similar result follows.¹

Marriage among *mohunts* and disqualification.

Ordinarily a marriage by a *mohunt* or *gosain* of a temple is a disqualification to his right to the *gudi*. As a *mohunt* is supposed to have renounced all worldly desires and pleasures his marriage would be regarded as invalid and his widow will have no right to inherit.² The Hindu Law does not recognize the validity of a marriage by a *gosain* who officiates as a priest of a temple. At Hardwar no doubt there are *gosains* who contract marriages. But they are known as *grihastha gosains* and are entirely engaged in secular occupations.

Amongst the class of *Fakirs*, called *Burkut*,³ marriage incapacitates for election to the office of a *mohunt*. A *mohunt* having nominated one of his pupils to be his heir and successor is competent to depose such pupil by reason of his subsequent marriage, and to nominate another of his pupils to succeed him in his office and property in the room of the pupil so deposed.⁴ The Court Pundit gave the following opinion :—“The adoption of a

¹ *The Secretary of State for India v. Haibatrao* 28 Bom. 276 (1903).

² *Gungapuree v. Musst. Jenuree* 2 N. W. P. Decis (Sel. Rep.) 49 (1854).

³ A *Burkut* ascetic is one who has no desire for the enjoyments

and pleasures, either of this world *riz*, the earth, or of the next world *riz*, paradise. (This is the definition given in the Vedant Books).

⁴ *Nursing Dook v. Pearce Lall* 2 N. W. P. Decis 249 (1855).

gosain by a *mohunt* is an act not mentioned in the *Shastras*, nor spoken of among men ; for adoption is the practice of worldly persons ; whereas amongst *mohunts*, it is customary merely to select pupils. Yet if a *mohunt* should adopt, the act would not prove worldliness on his part, nor would he thereby become a worldly, or a family man, but such a procedure would certainly be opposed to the religious customs of his fraternity. Amongst *gosains* it is considered highly improper for a *mohunt* to marry. A *guru*, can, therefore, deprive a pupil, who has contracted marriage, of his right to succeed to the office of *mohunt* and bestow the same to another pupil." This was a case of the *gosains* of Brindabun, and with reference to them the Pundit said :— "Among the *gosains* of Brindabun, also, a *guru* is competent to deprive the *chela* first appointed, if he marry, of his title to succession and to appoint another *chela* in his stead ; for a virtuous *chela*, who is entitled to inherit the estate of a deceased *guru*, become disqualified by marriage as this is the condition of family men, and a *chela* has no title to inherit the estate of a family man."

But among the *gosains* of the Deccan and certain other places marriage does not work a forfeiture of the office of *mohunt* and the rights and property appendant to it. In *Gosain Rambharti Jagrupbharti v. Mahunt Ishvarbharti*¹ the Court held that where the plaintiff proved his right of succession to a *mutt* on the death of its *mohunt*, the burden of proving that his subsequent marriage worked a forfeiture of his office and its appendant property and rights, lay upon the defendant who impugned the plaintiff's right on account of the marriage. Their Lordships observed : "In paragraph 6 of Appendix B, the Essay of Mr. Warden on *Gosains* annexed to Mr. Steele's Work on Caste p. 434 (2nd Edn.) it is, in sub-

Among
gosains
of the Deccan
marriage does
not work a
forfeiture.

stance, said that *Gosains* wandered so far from the road (asceticism, celibacy, chastity) they professed to follow as to form matrimonial connections and became in every respect as worldly as their neighbours, but are not acknowledged as *Gosains* except in the Deccan. The evidence in this case, however, shows that the exceptions made by the author must be extended to other places than the Deccan also. It has been proved that the *Bharti* sect of *Gosains* in the locality whence this appeal comes, very generally marry ; and although it has not been proved that there has been within the memory of the witnesses in this case any instance of a *Mohunt* of the *mull* of *Dhundhaduri* being married, yet it has been established that the *Mohunts* of several adjacent *mulls* are so, and there is one, if not two, instances, of married member of the *Bharti* sect being a *Mohunt* of a *mull*.¹

Female Adhikari.

The question of the right of women to be *Adhikari* was decided in *Poorun Narain Dutt v. Kashisnree Dossee*.² There it was found that the lady, the widow of the deceased *Adhikari*, gave "montros" which were accepted and was nominated by her deceased husband to be *Adhikari*. And prior to the institution of the suit no one disputed her right to be such. The Court observed : "It has been held in this Court that a woman can be a *mutwaliee* and that the profits of a *devuttur* can be received by a female. We are not shown that a woman cannot be an *Adhikari*." The Court, in this case, did not call for any *Fyavastha* from the Pundits. In an early case³ in Bombay the question for determination was whether a Hindu female was competent to perform, either in person or vicariously, the services for the maintenance of which a religious endowment had been granted. There the widow of one of the descendants of the grantee of a *Varshashan*, or annual

¹ 5 Bom. 684. See *Balgir v. Gosavis in Bombay Infra.*

Dhond Gir 5 Bom. L. R. 114 (1902) and *Gitabai v. Shirubakos Gir*, Ibid 318 (1903). See *Gharbari*

² 3 W. R. 180 (1865).

³ *Keshubhhat v. Bhajirathi Bai*, 3 Bom. H. C. R. 75 (1865).

allowance,—paid from the Government Treasury for the performance of religious services in a Hindu temple,—sued to recover arrears due to her husband's branch of the family from another descendant who had received the whole stipend, and it had been found by the Court below that, by the usage of the family, the duties of the office had been performed in rotation, and the stipend distributed amongst the descendants of the grantee in certain fixed proportions. The High Court, however, dismissed her claim on other grounds.

In *Sitaram Bhat v. Sitaram Ganesh*¹ the same Court held that the descendants claiming through females (daughter's sons) could claim to succeed to a hereditary priestly office. In *Dhuncooverbai v. The Advocate General*,² it was held that, in the *sunjogee bairagee* community, females are recognized as *mohunts* and that the position and status of these *bairagee mohunts* was almost identical with that of *mohunts* in other parts of India. The Madras High Court in several cases has laid down that females may be *dharmakartas*.³ But the Sudder Court of the N.W. Provinces has held that though a female may be the disciple of a *gossain*, she cannot succeed to his property, the succession being confined to male *chelas* or disciples.⁴

Nisprahi and *Gharbari Gosatis*⁵ are found in Bombay. The former are a class of celebates who are, in other respects, secular. Among them the devolution of property is governed by the rules which apply to strict ascetics.

Nisprahi and
Gharbari
Gosari in
Bombay.

¹ 6 Bom. H. C. R. (A. C. J.) 250 (1869).

Radhamohun Mundul v. Jadoo-moujee Dosree, 23 W. R. 369 (P. C.)

[1875]; *Maharanae Shibessource Debia v. Molhooranjit Achario*, 13 Moo. I. A. 270 (1869).

² *Sengram Singh v. Debee Dutt*, 2 N. W. P. Decis, 235 (1855).

³ See Steele's *Law and Customs of Hindu Castes* p. 414 re *Gharbari Gosavis*.

⁴ *Soundarakaja Chenar v. Poonamunjar*, Mad. S. D. A. 43 (1850); *Sashummal v. Parker*, Mad. S.D.A. 237 (1853); *Sudagopak Cherry v. Sudagopak Cherry*, Mad. S. D. A. 55 (1854). See also *Hari Dasi Dabi v. The Secy. of State for India*, 5 Cal. 228 (1879);

But in practice *nisprahi gosavis* have in numerous cases contracted morganatic or formal marriages and thus become known as *gharbari gosavis*. The *gharbari gosavis* are competent to contract valid and lawful marriage. They do not form a distinct body governed by a different rule of inheritance from the *nisprahi gosavis*. The widow of a *gharbari gosavi* is not entitled to succeed to his property in preference to the *chela* of a *gurubhaubaul* of the deceased, but she is entitled to residence in and maintenance from the property of her deceased husband.¹

According to the custom obtaining among *gharbari gosavis*, a stranger may be adopted, who would acquire rights of succession superior to a son born, but one son is never adopted to the prejudice of the others, and in the absence of an adopted stranger, sons succeed equally.²

Grant to a
Gosavi and
his disciples.

A grant to a *gosavi* and his disciples in perpetual succession coupled with dispositions which practically make it an endowment of a *murti* with a limitation of the enjoyment to a particular line of celebrants of the worship therein, does not entitle an individual *gosavi* to encumber the endowment beyond his own life. A grant to a *gosavi* and his disciples is intended by a Hindu grantor to be a perpetual fountain of merit producing benefit to himself, and this intention would be entirely defeated by the division of the gift at the will of any unprincipled successor of the original grantee to purely secular uses. In a particular case³ the grant declared that the allowance was to be enjoyed by the grantees and by his disciples and successors from generation to generation. The grant was for the worship of the goddess of wealth and for feeding and otherwise supporting poor and deserving people. Such a grant cannot be said to be equivalent to a grant to a man and his heirs.

¹ *Gitabai v. Shikabakus Gir.* L. R. 114 (1902).

² *Bom. L. R.* 318 (1903).

³ *Khusalchand v. Mahaderyir.*

⁴ *Balgir v. Dhond Gir,* 5 Bom. 12 Bom. H. C. R. 214 (1875).

In the case of *Mohunt Burm Suroop Dass v. Kashee Jha*,¹ it has been held that a *mohunt* in charge of an endowment cannot, except distinctly for its benefit, encumber it beyond his own life. The same principle should govern the grant to a *gosavi* and his disciples. An individual *gosavi* is no more at liberty to sell the endowment than a *ratandar* the endowment of his office.

The existence in India of dancing girls in connection with Hindu temples is according to the ancient established usage of the country, and the Court "would be taking far too much upon itself," (to quote the words of Sargent, C.J.,) "to say that it is so opposed to 'the legal consciousness' of the community at the present day as to justify the Court in refusing to recognize existing endowments in connection with such an institution".² Accordingly, where the plaintiff sued, as the adopted daughter of a dancing girl attached to a temple, to redeem and have her right recognized to manage the *inam* lands assigned as the remuneration for the temple office, her claim having been rejected on the ground that the adoption could not be recognized by the Civil Court, the High Court held that the plaintiff's suit should be allowed. The lands in question were not claimed as being the property of the last incumbent, but as a part of the endowment of the temple of which she had been the manager. The alleged adoption only had effect as nominating the plaintiff to be the successor in the management, and if it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should nominate her successor, the Courts of Law could not refuse to recognize it, such custom being recognized in the country.³

Temple
endowments
and dancing
girls.

In ordinary parlance, the term '*kallai*,' as applied to temple endowments, signifies a special endowment for certain specific service or religious charity in the temple.

Kallai.

¹ 20 W. R. 471.

² 14 Bom. 90 p. 93.

³ *Tara Naikin v. Nana Lakshman*, 14 Bom. 90 (1889).

Ardajama kattai, or endowment for midnight service, is an instance of the former and *Aunadana kattai*, or an endowment for distributing gratis food for the poor, is an example of the latter. In this sense the word *kattai* is used in contradistinction to the endowment designed generally for the up-keep and maintenance of the temple. In the case of some important temples, the sources of their income are classified into distinct endowments according to their importance; each endowment is placed under a separate trustee and specific items of expenditure are assigned to its legitimate charges to be paid therefrom. Each of such endowments is called also a *kattai*, and the trustee who administers it is called the *katlaigar*, or the *stanik* of the particular *kattai*.¹

In *Vythilinga Pandura Sannadhi v. Somasundara Mudaliar*² the term *kattai* is used in this sense. There the *punchyeldars*, or managers of a temple, being directed by the Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent some money in so doing from the funds of a *kattai*, or endowment of which they were managers. They then sued the trustees of two other *kattais* for recovery of the said sum on the ground that, by the usage of the temple, the costs of repairs were payable from the defendant's income and asked for a declaration that the duty of executing repairs fell upon the defendant's *kattais*. It was held that in the absence of any endowment or trust-deed regarding the *kattais* the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their *kattais* should permit.

Vythilinga Pandura Sannadhi 199 p. 200 (1899).
v. Somasundara Mudaliar 17 Mad. * 17 Mad. 199 (1893).

The temple of *Kachankurissi* is an ancient Hindu temple in South Malabar. It is of such antiquity that nothing is known as to its foundation or original constitution. In a suit its *urallers*, or managers, sought for a declaration that they themselves were entitled to the exclusive management of the temple and that the defendants had no right over, or right of management in, the said temple. The defendants, representing the *Numbuidri* family, were the descendants of the former rulers of the locality, and, as such, possessed certain sovereign rights of superintending the temple. These rights were called their *melkoima* rights. Disputes having arisen, the predecessors of the parties in 1845 and again in 1874 had compromised litigation and agreed, with the result that they had since then continued to act upon the agreement that they should jointly exercise the powers of management. It was accordingly decided that the compromise so agreed to was binding upon the plaintiffs, (*urallers*) and that the usage which had been followed since 1846, was the best exponent of the *melkoima* right and that the compromise could not be re-opened.¹

Temple of
Kachankurissi: *Melkoima* rights.

Sanjogee bairagees are religious mendicants, drawn from any caste. They are a distinct section of the Hindu community in Bombay. The origin and *status* of the Bombay *bairagee mohunts* is not wholly free from obscurity. Their position, if not identical with that of *mohunts* in other parts of India, bears a strong analogy to it. Among these *bairagees* a female can be appointed a *mohunt*. The procedure of appointing a *mohunt* is the same as in other cases, viz., the *mohunt* incumbent nominates his successor, and other *bairagees* at the *bundhara* of the deceased *mohunt* invest the person elected with the *mohunt's chudller* according to the recognized formalities prescribed for such an occasion.²

*Sanjogee
Bairagees of
Bombay.*

¹ *Cherukuneth Manukel Nitakundhen Nambudirapad v. Venugnat Sircarpathil P. R. F. v. Nambidi* 18 Mad. 1 (1894).

² *Dhuncoorerbai v. Advocate-General* 1 Bom. L. R. 743 p. 747, 749 (1899).

A reference to *sanjogees* was made by the Sudder Dewany Adawlut in relation to succession to a *mutt* in Puri. There it was held that the office of a *mohunt* of that particular *mutt* passed to that class of *mohunts* who are known as *nyunjee*, or *beyjogee*, i.e., *ascetics*, and not to the *sanjogeess*.¹

*Bairagee mutts' :
succession.*

The term *bairagee* is applied to the *vaishnavas* of the *ramanundee* class or its ramifications.² The *ramanundee* class would appear to have recognized custom in respect of succession, and where on the demise of the superior of a *mutt* there is no *chela* to succeed, the heads of the *mutts*, who look up to some one of their own order as chief, and refer to that superior connected with their founder as the common head, assemble under the presidency of such superior *mohunt*, or, in his absence, some other *mohunt*, and elect a successor from the pupils of some other teacher. The Court observed : "It should be ascertained upon evidence to what sect of *bairagees*, the deceased *mohunt* and his predecessors belonged, whether they acknowledge any superior of any *mutt* as entitled to preside at the election of a successor or whether this *mutt* is isolated and apart from other *bairagees' mutts*, and, further, whether there is any usage to regulate the successor to a *mutt* or whether each *mutt* has its own peculiar custom and is not bound by what prevails amongst *bairagees* of the same tribe. It may be that hitherto the *chela* has succeeded to the *guru* as a matter of course. But here, as there are no *chelas*, so the case should be decided according to usage of other *mutts* of the same tribe, unless it be established that each *mutt* can regulate its own successor, and that some particular rule has prevailed in the case of this *mutt*, so as to entitle the plaintiff to succeed : and that the late *bairagee* belonged to no tribe or com-

¹ *Mohunt Gopal Das v. Mohunt* (1851).

Kirpa Ram Dass 7 S. D. Decis 162

² Vide Wilson's *Sects of Hindus*.

munity so as to bind the succession by the rules of that community."¹

The rule of succession to an *Adhinam* formed the subject of decision in a Madras case.² The plaintiff was *pandara sannadhi* and, as such, the representative for the time being of the *adhinam*, and the defendant claimed to be *tambiran* of the disputed *mutt*, which was founded by a member of the *adhinam*. The plaintiff contended that the *mutt* belonged to his *adhinam*, that the appointment of *tambiran* of that *mutt* rested with him, and that only *tambirans* of his *adhinam* were eligible to be appointed; that the defendant's succession to that appointment under the Will of his predecessor was illegal and invalid. The Court held that the *mutt* was affiliated to the *adhinam*, but that the head of the *adhinam* was not entitled to an order for delivery of the property of the *mutt* to himself or to his appointee. On the evidence as to the usage in the establishments in question, it was found that the head of the *mutt* was entitled to appoint his successor, but that his election was limited to members of the *adhinam*; and the head of the *adhinam* was entitled to enforce this rule, though he was bound to invest a disciple's property nominated by the head of the *mutt*, the defendant not being a disciple of the *adhinam*.

¹ *Ram Das Byrappa v. Gunga Sannadhi v. Kandasami Tambiran*, *D.L.S.* 3 Ag. H. C. 295 (1868). *10 Mad.* 375 (1886).

² *Giyana Sumbandha Pandara*

Succession to
an *Adhinam*.

CHAPTER VII. HINDU CUSTOMS.

INHERITANCE.

In dealing with customary rules of inheritance in this chapter we should remind our readers that those regarding Impartible Estates or Religious Establishments have been noted under each head separately and we do not wish to repeat them here. Herein we propose to delineate other customs relating to succession which have received recognition by the British Courts. In cases of inheritance *kulachar* or family custom has the prescriptive force of law¹ and we will see how family custom has prevailed over ordinary law.

Exclusive right of succession of an eldest son.

The exclusive right of succession of an eldest son is limited to Regalities and ancient zemindaries when the common Hindu law of inheritance gives place to the usage of the family or of the country.² Such right does not affect zemindaries acquired by recent purchase, it being only applicable to Regalities and ancient zemindaries.³

Succession by sons by different

In matters of succession there is no difference between sons by a first wife and those by subsequent wife or wives. According to the Hindu law sons by different mothers inherit equally. A distribution of the paternal estate is made among them not with reference to mothers but with reference to the number of sons. Similarly, where by family custom the rule of primogeniture prevails, the eldest son whether born of the first wife or any one of the other

¹ *Sumrun Singh v. Khedun gar.* Mad. Decis. 27 (1849).

Singh, 2 S. D. Sel. Rep., 116 (147) [1844].

² *Jugunadharow v. Kondarow*,

Mad. Decis. 112 (1849). 1 Morley's Dig. 188

³ *Mootoorengududachellusamy Manigar v. Toombaygasamy Mani-*

subsequently married wives, will have the preferential right to succeed to the estate of his deceased father. The rank of the senior wife or the priority of her marriage will have nothing to do with her son's succession, if he does not happen to be the first born or eldest son of his father.¹ Sometimes by custom the reverse rule may prevail, as among the Kumbla zemindars. There, according to a valid custom, the son by a senior wife has a prior right of succession to a son by a junior wife, even if the latter is the elder son.² The Privy Council has held in two cases that priority of birth of a son is not affected by the prior marriage of the mother.³ But both these decisions are authorities only for the proposition that as between sons born of wives, equals in class and without any other distinctions, there is no seniority in right of their mothers, but that the seniority recognized, is according to birth. Their Lordships did not decide the rule of succession in the case when the wives are of different caste or class, and their marriages have taken place under different forms. In *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*,⁴ the Madras High Court had to decide this point. There, the plaintiff's mother and the defendant's mother were not equal in caste or class. There was the further distinction, viz., the former was a dagger wife,⁵ whilst the latter was married by the pure caste rites without the intervention of a dagger. After considering various authorities the Court was of opinion that the rule of succession should be one of pre-

¹ *Rajah Rughonath Singh v. Rajah Hurihar Singh*, 7 S. I. D. Sel. Rep. 126 (1843).

² *Ramasami K. Naik v. S.K. Naik*, 17 Mad. 422 p. 437 (1894) : s. c. in the Privy Council 26 I.A. 55 (1899).

³ *Ramalakshmi Ammal v. Sirasanthu Perumal Sethurayar*, 14 Mys. I. A. 570 (1872) ; s. c. 17

W. R. 553 : s. c. 12 B. L. R. 396 : *Pedda Ramappa Nayaniaru v. Bangari Sesamma Nayaniaru*, 8 I. A. 1 (1880) : s. c. 8 C. L. R. 315 : 2 Mad. 286. See also 5 Bom. H. C. R. 161.

⁴ 17 Mad. 422 (1894).

⁵ See *infra* under Marriage and Divorce, Chap. VIII.

ference in favour of the son by a wife of the same caste or rank. Thus between sons of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of a higher class, is superior to that of an elder son of a wife of lower class.¹

Among Tipperah Rajahs, sons of slave girls or *kachna* Ranis married in an inferior form have equal right of succession to the Raj with the sons by Ranis married in a regular form.²

Foolkoosupah
Raj; whether a
son by a *bhati*
Rani has
preference to
a son by a
bebhati Rani

In the family of the Rajah of Foolkoosunah in Manbhoom, there are two classes of Ranis—*bhati* and *bebhati*. *Bhati* Ranis are those who can eat rice with the Rajah or whose rice can be taken by the Rajah. *Bebhati* or *bhegurbhati* Ranis are those whose rice cannot be eaten by, or, who cannot eat rice, with the Rajah. In *Rajah Nagendur Narain v. Rughoonath Narain Dey*,³ the defendant, a younger son of the Rajah, opposed the claim of the plaintiff on the ground that the latter was the son of a *bebhati* Rani (she being of the Silda family), and as such could not attain to the Raj; and that, in order to succeed he must prove a *kulachar* or family custom to that effect. It was undisputed, however, that according to the custom of inheritance in the family, the succession to the estate devolved to a single heir to the exclusion of the other heirs of the deceased. The plaintiff was the eldest son and therefore presumably would be the successor to his father. The parties were *Kshatriyas*. It appeared that the family of the Rajahs of nine Mahals in the Jungle Mahals were of higher dignity than the other Rajput families. One of these was the Tong family, that of the Rajah of Foolkoosunah; others were the Dholl, Mull, &c. The

¹ See Family Customs, *supra* p. 58, for a rule of succession between a son by a *paat* Rani and a son by a *phoolbihaki* Rani in the Tributary Mahals in Cuttack; and also under Marriage and

Divorce, Chap. VIII, *infra* as between the issue of a *sugai* marriage and a *bihaki* marriage.

² See under Marriage and Divorce, *infra*.

³ W. R. (1861) 20.

Silda, Samunt, and Soor families, though Rajputs and *Kshatryas*, were considered of somewhat inferior grades. The High Court of Bengal having considered the evidence observed :—“The conclusion is that there is absolutely nothing in the evidence to show that the son of a Rani of the Samunt family may not succeed to the Raj in the Tong or Foolkoosunah family; that, on the contrary, there is strong evidence that he may do so. No single instance has been cited or referred to in any of the proceedings to show that amongst the legitimate sons of these Rajput families, the claim of an elder son born of a Samunt mother has been treated as subordinate, or postponed to, that of a younger son, born of a Rani of the nine families. And there is nothing in Hindu law to countenance such a distinction between legitimate children born of mothers of the same great caste.”

We have already dealt with the exclusion of females from succession in connection with Impartible Estates.¹ In *Russic Lall Bhunj v. Purnah Munnee*² a childless widow claimed the share of her husband. Her claim was opposed by other sharers on the ground that by a custom of the family, if a person died without direct male issue, neither his wife, daughter or daughter's son can succeed. Upon the evidence it was held by a majority of Judges that the custom of excluding childless widows had been fully and satisfactorily established. In *Burjore v. Bhagana*³ the paternal grandmother of a deceased share-holder claimed to inherit in preference to his male collateral relations. The latter replied that she being a female was excluded from the inheritance by the custom of the family and tribes of the Pande Brahmans in Oudh to which the parties belonged. But upon evidence, including the village Wajib-ul-urz, the customary exclusion of females as alleged was not substantiated. According to the law and usage

Exclusion of
females from
succession.

Widows.

¹ *Vide. Supra* p. 186.

² 10 Cal. 557 (P. C.) (1883).

³ S. D. Decis 205 (1847).

of the Benares school, a brother's widow has no place in the line of heirs ; nor is she entitled to succeed by right of survivorship.¹

In a Bombay case the allegation was that among the Gohel Girassias, according to the custom, the widows and daughters were excluded from inheritance. The lower court found that the custom proved excluded daughters, but not widows, from inheritance. The High Court, however, after examining evidence, held that the custom to exclude daughters was not proved.² From the absence of any finding regarding widow's claim it may be surmised that the widows are not excluded.

In a Madras case it was alleged that according to the custom prevailing in Southern India, the senior widow by date of marriage succeeds in the first instance, the others inheriting in their turn as they survive, but being only entitled in the meantime to be maintained by the first. This custom is not supported by the decision of the Courts, nor by any text-writer of paramount authority in the Madras Presidency. Consequently it was held that the ordinary Hindu law prevailed, according to which the separate property of the deceased husband is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship.³

Daughters. Among the Jamboo Brahmans if a man dies leaving a daughter and no male issue, the daughter and her daughter would inherit his property, even when undivided, in preference to the collaterals of the deceased, in accordance with the custom of the caste.⁴ Among the members of the Utpat families of Pandharpur in the Solapur district, daughters are excluded from succession by a long and a

¹ *Jagdamba Koer v. Secretary pathi Radhamani* 1 Mad. 290 of State 16 Cal. 367 (1889). (P. C.) [1877].

² *Desai Ranchhoddas Vithaldas v. Rawal Nathubhai Krishbhai* 21 Bom. 110 (1895).

³ *Dessaeer Herreshunkar v. Buees Mankoowar and Umbe* Bom. Sel. Rep. 122 (1838). Morley's Dig. 334.

⁴ *Gajapathi Nilamani v. Gaja-*

uniform family usage.¹ Similarly in the Bahrulia clan in Oudh there exists a custom excluding daughters from inheritance.²

A special custom regulating the succession to *bhagdari* lands in the Collectorate of Broach is that on the death of a *bhagdar*, whether Hindu or Mahomedan, without male issue, his married male relations (after the death of his widow) whether sprung through male or female relatives of the deceased *bhagdar* succeed to his *bhagdari* lands to the exclusion of his daughter or sister.³

A sister is entitled to succeed to her deceased brother's property as heir of her son who has died, and it is immaterial for the protection of her title as heir, whether her son be born before or after the deceased party whose property she claims.⁴ A sister's son inherits in Bengal.⁵ Till the year 1867, the prevailing opinion was that in the provinces governed by the *Mitakshara*, a sister's son could not inherit; the estate would escheat rather than pass to him. Even the Judicial Committee was of that opinion.⁶ But the question again came up before them the following year and their Lordships by their decision, dated the 17th July, 1868, in the case of *Gridhari Lall Roy v. Government of Bengal*,⁷ held that the maternal uncle of the father of the deceased was not excluded from the class of *bundhus* capable of inheriting, and that the text contained in the 1st article, sixth section, of the second chapter of the *Mitakshara*, does not purport to be an exhaustive enumeration.

In *bhagdari*
lands in
Broach.

Right of a
sister to suc-
ceed.

¹ *Bhan Nanaji Utpat v.* 865 (1859).

Sundrabai 11 Bom. H. C. R. 249 (1874).

² *Lehraj Kuár v. Mahpal Singh* 5 Cal. 744 (P. C.) [1879] : s. c. 6 C. L. R. 593 : s. c. 4 Shome's Notes 42.

³ *Pranjicak Dayaram v. Bai Reva* 5 Bom. 482 (1881).

⁴ *Damoodur Chunder Roy v. Must, Beeruojamoyee* 6 Sevestre

⁵ *Jowahir Rawat v. Must,*

Kuilaoo 8 Sevestre Part I p. 519 (1864). 2 Strange's Hindu Law p. 168 ; *Rajchunder v. Gocul-chand* 2 S. D. Sel. Rep. 43 (1801).

⁶ *Thakooraia v. Mohun* 11 Moo. I. A. 386.

⁷ 12 Moo. I. A. 448 (1868) : s. c. 1 B. L. R. 44 : s. c. 10 W. R. 32.

of all *bundhus* who are capable of inheriting; that it is not cited as such or for that purpose by the author of the *Mitakshara*. In the case of *Amirto Kumari v. Lukhy-narayan Chukerbutty*¹ a Full Bench of the Calcutta High Court held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property subject to the *Mitakshara*. The Full Bench made reference to the afore-mentioned Privy Council decision. It should be noted that a division Bench of the Calcutta High Court had decided *Amirto Kumari's* case while *Gridhari Lall Roy's* case was pending in the Privy Council, and at its hearing the Calcutta High Court's decision was cited and approved of by the Privy Council. The Full Bench after citing the Privy Council's decision confirmed the division Bench's ruling.

The general rule in Bombay has long been and is to treat the sisters as heirs to the brothers rather than the paternal relatives.² In *Lakshmi v. Dada Nanaji*³ and *Biru v. Khandu*⁴ it has been decided that the sister, in the Sholapur district, is not only an heir, but is entitled to preference even over some who are *gotraja sapindas*. In a very recent case⁵ the Bombay High Court has laid down that in the district of Dharwar a sister is preferred as an heir to a brother's widow. In this case his Lordship the Chief Justice observed thus: - "These questions in which the right of female heirs comes under debate, turn in Bombay, on considerations peculiar to this Presidency, and it is therefore useless to seek guidance in the decision of the other High Courts. In Gujerat and the Island of Bombay the right of a sister to a high place in the order of succession has long been determined and has the sanction of the *Mayukha*, whose author is said to have flourished about 250 years ago....That there is a usage,

¹ 10 Sevestre 20 (1868): s. c. 12
B. L. R. 28 (F. B.)

² *Venayech Anundrow v. Luwu-meebaee* 7 Sevestre 1085 (1864).

⁴ 4 Bom. 210 (1879).

⁵ *Ibid* 214 (1879).

³ *Rudrapa v. Irura* 28 Bom. 82 p. 85 (1903).

under which the sister succeeds as an heir when outside Gujrat and the Island of Bombay, is, we think, beyond doubt ; the struggle has been to reconcile that usage with the Sanskrit commentaries, but in view of the decided cases, it appears to us immaterial whether we invoke in support of it the rule of Nilkantha, or the interpretation of Balambhatta or Nunda Pandit."

According to the Hindu law of succession in force in the Madras Presidency a sister's son, being a *bandhu*, is in the line of heirs.¹

When a question regarding inheritance arises between parties of the Jain sect the Court should enquire into the customs of the sect and be guided by the result of the inquiry. If the party alleging the custom succeeds in establishing the same to the satisfaction of the Court, then, whether the custom be at variance, or in accordance with, Hindu law, the Court is bound to give effect to the custom.² In the same case the Privy Council held that although ordinary Hindu law, in the absence of proof of special customs, has usually been applied to persons of the Jain sect in Bombay, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined, and are not open to objection on grounds of public policy or otherwise.³

Jains are dissenters and are mostly of *Vaishya* origin. The four main divisions of Jains are *Pramar*, *Oswal*, *Agarwal*, and *Khandewal*. In a very recent case⁴ the Bombay High Court held that unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. By ordinary Hindu law is

¹ *Chelikani Tirupati Rayanin-guru v. Rajah Suraneni Venkata Gopala Narasimha Rao Bahadur* 6 Mad. H. C. R. 278 (1871).

² *Dakho*, 6 N.-W. P. 382 (1874) : s. c. 1 All. 688.

³ 5 I. A. 87 (1878).

⁴ *Ambabai v. Govind*, 23 Bom.

Sheo Singh Rai v. Musst. 257 (1898).

meant the law that governs the three superior castes of Hindus viz., Brahmans, Kshatryas and Vaishyas. The High Court in Bengal expressed the same view.¹

The term "Hindu" in section 331 of Act X of 1865 means and includes a "Jain" and consequently, in matters of succession, Jains are not governed by that Act.²

Jain widow's right.

Under the *Mitakshara* the right of surviving coparceners of a joint Hindu family depends upon survivorship and not upon inheritance. There being a community of interest and unity of possession between all the members of a joint family, upon the death of any one of them, the others take by survivorship that in which during the life-time of the deceased they had a common interest and a common possession. This principle of coparcenership applies to the Jains who, like Hindus, are governed by the *Mitakshara* doctrines. Therefore, as between husband and wife, the interest of a deceased husband when joint survives to the co-sharers in preference to his widow's right of inheritance. But where the husband is separated and there is no community of interest, the deceased husband's estate does not pass by survivorship to the other sharers but descends to his widow.³ The Privy Council in *Sheo Singh Rai v. Musst. Dakho*,⁴ held on the evidence adduced in the case, that a sonless widow of a *saraogi-agarwala* takes, by the custom of the sect, a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus, to the extent at least of an absolute interest in the self-acquired property of her husband. In *Ambabai v. Gorind*,⁵

¹ *Lallah Mohabeer Pershad v. Musst. Kundur Koowar*, Ind. Jur. N. S. 312 (1867) : s. c. 8 W. R. 116; *Chotay Lall v. Chunnoo Lall*, 6 I. A. 15 (1878); *Bachebi v. Makhan Lall*, 3 All. 55 (1880).

² *Bachebi v. Makhan Lal*, 3

All. 55 (1880).

³ *Lallah Mohabeer Prosad v. Musst. Kundur Koowar*, Sevestre Part IV, 423 (1867) : 8 W. R. 116. ⁴ 5 I. A. 87 (1878). ⁵ 23 Dom. 257 (1898).

it was held that among Jains of the *dassa parwad* caste, who came from Gujurat to the Belgaum district and carried their laws and customs with them, the widow is the sole heir of her deceased husband, and that the illegitimate sons of her husband are not entitled to inherit their deceased father. Amongst *agarwala banias* of the *saraogi* sect of the Jain religion a widow has full power of alienation in respect of the non-ancestral property of her deceased husband, but she has no such power in respect of the property which is ancestral.¹ The alienation by gift by the widow of a *bindala* Jain of her husband's ancestral property is invalid according to the *Mitakshara*, which is the ordinary law governing *bindala* Jains in the absence of custom to the contrary.² A custom was alleged, in a recent Allahabad case,³ to prevail amongst the members of the *saraogi* community in the N.- W. Provinces of India to the effect that, by reason of it, females are excluded from inheriting the property of their father. But as the evidence given upon this point was conflicting, the custom was held to be not established.

Jain *Shashtra* recognizes the heritable right of the adopted son.⁴ In a case where the parties were descended, either directly or by adoption, from a common ancestor, and the plaintiff claimed by right of inheritance a certain portion of the property as his share, the Sudder Dewany Adawlut in the N.-W. Provinces held that in a claim for inheritance, based on the *Shastras* and the usages of the sect, where both parties are *saraogis* the term "Shastras" used in the plaint does not necessarily imply the *Shastras* of the Hindus and that the plaintiff is entitled to a decision of his claim under the Jain law.⁵

Rights of
adopted son
among Jains.

¹ *Shimbhu Nath v. Gayan Chand*. 16 All. 379 (1894).

² *Bachebi v. Mukhan Lal*, 3 All. 55 (1880).

³ *Bansi Lal v. Dhapo*, 24 All. 242 (1902).

⁴ *Maharaja Gocindnath Roy v. Gulalchand*, 5 S. D. Sel. Rep. 276 (1833).

⁵ *Munnoo Lal v. Gakul Pershad*, N.-W. P. Decis 263 (1860).

Sikh succession.

By the Sikh law the widow inherits the property solely, if there be no children.¹ There is no difference between the rights of inheritance of a *nikah* or second wife and of a woman who had been married only once; and therefore the widow of two husbands would inherit the property of her last husband, in the same right and manner as if she had never been married before.² Where an intestate Sikh dies leaving a widow and an adopted or natural son surviving him, the widow is entitled to five-sixteenths of the intestate's property and the son to the remainder.³ A son by the *anand* marriage⁴ (which is a sort of inferior marriage) gets a share of his father's property equal to one-half of the share of a son by the *biak* or regular form of marriage.⁵

Among Jats.

Where two half-brothers, Jats, claimed to inherit the landed estate of their father, the one being born of a married wife, and the other the issue of a woman who had been united to their common father by the ceremony of *kaje* or *kerao*; and it was proved to be the father's intention that each son should get an equal share of his estate, the Court decreed accordingly.⁶ In *Khooshal Singh v. Ruo Omrao Singh*,⁷ it was held that the illegitimate son of a Jat, who is of Sudra class, by a woman of unequal caste, cannot inherit paternal property, as no proof was adduced proving that custom prevails among Jats to unite themselves by the ceremony of *kerao* or *dhericha* with women of unequal caste and that the sons of such unions succeeded to their father's estate.

Succession to the property of ascetics.

The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely

¹ *Kissenchunder Shaw v. Bai-dam Beebe*, East's Notes, case 14, Jan, 1815 : Morley's Dig. p. 350.

² Ibid.

³ Ibid.

⁴ See *intra* Marriage & Divorce.

⁵ *Juggomohun Mullick v. Saum-*

coomar Beebee, East's Notes, case 31, Mar. 1815.

⁶ *Kouwar Kishen Singh v. Kon-war Golab Singh*, N.-W. P. 173 (1861).

⁷ N.-W. P. Decis Part II, 320 (1864).

upon fellowship and personal association with that other, and a stranger, though of the same order, is excluded.¹ Amongst *sannyasis* generally no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his life-time as his successor, which nomination is generally confirmed by the *mohunts* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among the *chelas*, such successor is elected and installed by the *mohunts* and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased.²

Where a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela* without alleging that he had been nominated by the deceased as his successor and confirmed, or that he had been elected as successor to the deceased, such suit was held to be unmaintainable.³

In *Gajraj Puri v. Achaibar Puri*⁴ the plaintiffs claimed that they as members of a fraternity of *nihangs* were, on the decease of another member, entitled to the succession to the property possessed by him, according to rules of inheritance prevailing in their religious brotherhood. They thus claimed to exclude the defendant, an alleged son of the deceased. This son, who was a minor, was in possession through his mother and guardian. The Judicial Committee, without deciding as to the alleged mode of succession to property among *nihangs* forming this brotherhood, affirmed the decision of the High Court to the effect that it had not been proved that the deceased

Among *Nihangs* in Gorakhpore.

¹ *Khuggender Narain Chowdhury v. Sharupgir Oghorrenath* 4 Cal. 543 (1878); s. c. 3 Shome's Notes 29. See also 29 All. 109 (1906).

All. 539 (1878); *Nirunjun Barthee v. Padarath Bharthee* S. D. Decis. N.-W. P. Vol. I, 512 (1864).

² *Madho Das v. Kamta Das* 1 All. 539 (1878).

³ *Madho Das v. Kamta Das* 1

* 21 I.A. 17 (1893); s.c. 16 All. 191.

was a member of the sect ; and on this ground the dismissal of the suit was maintained.

Succession to
the estate of
a *gawari* in
the Deccan.

According to the authorities cited in West and Bühler's Hindu Law¹ a *guru* in the Deccan has a right to nominate his successor from amongst his *chelas*, by a written declaration. In *Trimbakpuri Guru Sitalpuri v. Ganga Bai*² the plaintiff did not set up against this general local law any special custom of the institution of the community to which he belonged. He relied on his mere discipleship and his recognition by the *dasname* after the death of the last incumbent. These grounds were held insufficient.

Bairagi :
letters of
administration
by
preceptor's
preceptor.

On the death of a *bairagi* or an ascetic, his preceptor's preceptor applied for letters of administration claiming that, according to the custom prevailing in the sect of which he and the deceased disciple were respectively members, he, as the preceptor of the dead man's preceptor, was entitled to his property. The Court held that the custom set up was proved.³

Migrating
families : rule
of succession.

Where a family migrates from one territory to another, if they preserve their ancient religious ceremonies, they also preserve their law of succession. The earliest reported case on the point is *Rajohunder Narain Chowdhry v. Goculchund Gok*.⁴ There the suit was for a landed estate situated in Bengal, and the contending parties were the deceased's nephews, i.e., his sister's son *versus* his brother's son. According to the Bengal school the former, and according to the Mithila school the latter, is the heir. The family originally came from Mithila and resided for generations in Bengal ; had intermarried with Bengal women and had not uniformly observed the religious observances of Mithila. It was therefore held that the Bengal school must govern the case. The Judicial Committee followed this case in *Rutcheputty Dutt Jha v.*

¹ Vide Ibid 554, 556.

Chunder Gonwami 5 C. W. N. 873

² 11 Bom. 514 (1887).

[1901].

³ *The Collector of Dacca v. Jagat*

1 S. D. Sel. Rep. 43 (56) [1801].

Rajender Narain Rai,¹ which is the leading case on the point. Their Lordships have held that Mithila law continues to regulate the succession to property in a family who have migrated from that district but have retained the religious observances and ceremonies of Mithila.

The general principle is that a person settling in a foreign country shall not be deprived of the benefit of the laws of his native district, provided he adheres to its customs and usages.² If a person of a Mithila family living in Bengal has a Mithila *purohit* and performs the ceremonies used on occasions of joy and mourning according to Mithila *shastra*, his right of inheritance and other claims are determinable by the law-authorities current in that country. But, on the contrary, if he abandons the customs and usages and religious observances of the place of his birth and adopts those of his domicile, he will be governed by the laws and customs of the latter place.³

In deciding the question whether the *lex loci* or the system of law prevailing in the country of origin governs the succession of a migrating family, the test to be applied is whether it has retained the original form and character of the religious rites and usages of the family as observed before the migration.⁴ Thus, where a Hindu family came many generations ago from Mithila where the *Mitakshara* prevailed and settled in Bengal where the *Dayabhaga* prevails, and acquired real and personal property situate in Bengal ; and it was found that the family retained their customs and usages and observed their religious rites and ceremonies according to doctrine of the *Mitakshara*, the Judicial Committee held, on a question of succession, that the *Mitakshara* and not the *Dayabhaga*,

Test to be applied.

¹ 2 Moo. I. A. 132 (1839).

292 (1847) ; *Rany Padmarati v.*

² *Gunga Dutt Jha v. Sreenarain Rai* 2 S. D. Sel. Rep. 11 (18) [1812].

Baboo Dooler Singh 4 Moo. I. A. 259 (1847) : s. c. 7 W. R. 41 (P. C.).

³ *Rany Srimuty Dibeah v. Rany Koond Lata* 4 Moo. I. A.

Dooler Singh 4 Moo. I. A. 259 (1847) : s. c. 7 W. R. 41 (P. C.).

the *lex loci*, was the governing authority to determine the right of succession.¹

Presumption. A Hindu migrating from one province to another and acquiring property in the territory where he has settled, is at liberty to carry with him his personal law so as to override the law of domicile or that of the *locus rei sitae*. Regard being had to the constitution of Hindu society and the well-known attachment of Hindus to their ancient religious customs and observances, it should be presumed until the contrary be proved, that a Hindu so migrating must have brought with him, and retained, all his religious ceremonies and customs and, consequently, his law of succession. This presumption becomes stronger where the family is shown to have brought with it its own priests, who, and their descendants after them, continue their ministrations to the family.²

The presumption may be supported by (*a*) previous instances of succession in the family which had followed that law rather than that of the domicile; (*b*) testimony as to the observance of rites and ceremonies at marriages, births and deaths which will show a strong body of affirmative evidence in favour of the continuance and against the relinquishment of the laws and customs of the land of origin; (*c*) or documentary evidence pointing of the same conclusion.³

¹ *Surendranath Roy v. Musst. Herramonce Burmowrah* 12 Moo. I. A. 81 (1868).

² *Ootum Chunder Bhattacharjee v. Obhoychurn Misser*, W. R. (F. B.) 67 (1862); s. c. 1 Hay 534; *Kumud Chunder Ray v. Secta Kanth Roy*, W. R. (F. B.) 75 (1863) : s. c. 2 Hay 232; *Obunnessurree Dabea v. Kishen Chunder Mahato*, 4 Wyman 226 (1867); *Junaruddeen Misser v. Nobin Chunder Perdham*, 1 Marshal 232 (1862); *Rani Parbati Kumari Debi v. Jagadis Chunder Dhubal*, 29 Cal. 433 (1902); (s. c.) 6 C. W. N. 490.

chunder Dhubal, 29 I. A. 82, (1902); s. c. 29 Cal. 433 *Lukhea Debia v. Gungugobind Dobey*, W. R. 56 (1864); *Sonatun Misser v. Ruttan Mullah alias Sookhoorda Debia*, W. R. 95 (1864); *Pirthee Singh v. Musst. Sheo Soondree*, 8 W. R. 261 (1867); *Surendro Nath Roy v. Hiramani Barmoni*, 12 Moo. I. A. 81 (1868) : s. c. 1 B. L. R. 26 : s. c. 10 W. R. 35 (P. C.).

³ *Parbati Kumari Debi v. Jagadis Chunder Dhubal*, 29 Cal. 433 (1902); (s. c.) 6 C. W. N. 490.

The presumption that a migrating family carries with them their own customs and usages may be negatived on proof of the fact that in matters connected with succession the laws of the country of domicile have been adopted by the migrating family.¹ Or, by showing that, except as regards marriage, all other ceremonies are performed according to the laws and customs of the domicile and by local priests.² The mere adoption of local customs and the observance of occasional local festivals and ceremonies would not prove that the law which originally governed a family had been set aside and another law substituted.³

The *onus* of proving the fact of old rites, customs and laws of succession having been abandoned and new one having been adopted lies upon the party who alleges cessation of such customs.⁴ Where a family migrated from Mithila, resided for generations in Bengal, intermarried with Bengal women and had not universally observed the religious observances of Mithila, there the Bengal law of inheritance was held to be applicable.⁵

The tribe of Brahmans, called *Sukuldipi*, living in various parts of Northern India, quite separate in social intercourse from other tribes of Brahmans, are governed by the *Mitakshara* school of Hindu law. Although they are scattered over a large tract of country, they are not blended with the tribes of Brahmans of the district in which they reside. A short description of this tribe

onus probandi.

Sukuldipi Brahmans.

¹ *Chundra Sheekhur Roy v. Nabin Soondur Roy*, 2 W. R. 197 (1865).

² *Ram Bromo Pandah v. Kaminee Sundaree Dossee*, 6 W. R. 295 (1866) s. c. 3 Wyman 3.

³ *Huro Pershad Roy Chowdhry v. Shibo Shunkuree Chowdhrain*, 13 W. R. 47 (1870).

⁴ *Sonatan Misser v. Ruttan Mullah alias Sookhoorda Debi*, W. R. 95 (1864); *Huro Pershad Roy*

Chowdhry v. Shibo Shunkuree Chowdhrain, 13 W. R. 47 (1870);

Lukhea Debia v. Gungagobind Dobey, W. R. 56 (1864); *Pirthee Singh v. Musst Sheo Soonduree*, 8 W. R. 261 (1867); *Soorendranath Roy v. Musst Heeramoni Burmanah*, 12 Moo. I. A. 81 (1868).

⁵ *Rajchunder Narain Chowdhry v. Goceil Chund Goh*, 1 S. D. Sel. Rep. 43 (1801).

is to be found in Sherring's "Hindu Tribes and Castes" at p. 102. It has been held that even if a family of the tribe resides in a country where the Mithila law prevails, it is governed by the *Mitakshara*.¹

Change of
habitat by
act of Govt.

When lands situate in one district are arbitrarily transferred by Government to another having a different system of law in matters of succession, the owners of those lands cannot be presumed to change their observances with their districts, presumption being against such change.²

Migration
from French
India to
British India

Migration by the widow of a Hindu subject of French India to British India and acquisition of a British Indian domicile, does not change the character of the estate held by the widow, and if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her former husband will be held by her according to the customary law of French India.³

Eldest male
heir of a de-
ceased trustee
succeeds.

In a suit to recover joint possession of certain lands, attached to a certain temple in the district of Tinnevelly, Holloway J., said : "It is found as a fact that the deceased father of the plaintiff and the first defendant, his brother, were joint trustees of this *pagoda*. The custom of the country so far as I know universally recognizes the right of the eldest male heir of a deceased trustee to succeed as trustee him from whom he inherits. It has not been attempted at the bar to deny that this is the law. If it is a question of special usage then the fact that the first defendant was a trustee while his elder brother was alive proves its existence in this case."⁴

Posthumous
son or heir.

The property of a deceased owner vesting intermediately diverts in favour of a posthumous son at his birth. There is

¹ *Rudr Perkash Misser v. Hur-*
dai Narain Sahu, 9 C. L. R. 16
(1881).

² *Prithee Singh v. The Court of*
Wards on behalf of Must. Sheo
Sundarree, 23 W. R. 272 (1875).

³ *Mailathi Auni v. Subbaraya*
Mudaliar, 24 Mad. 650 (1901).

⁴ *Purapparanalingam Chetti v.*
Nallusiecan Chetti 1 Mad. H. C. R.
415 p. 417 (1863).

no rule of Hindu law which prevents such a custom operating in favour of any other posthumous heir who had been conceived at the time of the possessor's death.¹

In *Gopi Chaud v. Sujan Kuar*² the parties were *Sadhs Sadhs.* and it was held that the Hindu law of inheritance was presumably applicable to them, the defendants having failed to show any custom prevailing opposed to the Hindu law.

The rule of succession applicable to the *Rajbansis* is the one which prevails in the locality in which they reside. They are distinguished from the migrating families who always carry their personal law wherever they go unless the contrary is shewn. The *Rajbansis* are Hindus and it must be taken that they have adopted in its entirety one form or other of that law. In the absence of any custom to the contrary or of any satisfactory evidence to show what form of Hindu law they have adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality.³

In *Pertab Deb v. Surup Deb Raikut*⁴ a claim was made by a brother to the estate of the deceased proprietor on the ground of a family usage whereby a brother succeeds to a deceased brother to the prejudice of the latter's surviving sons. But as the alleged family custom was not proved, his claim was disallowed.

A custom alleged to exist among the *Kapali Bania* caste, according to which a son is not entitled to the partition of ancestral property in his father's life-time and, against his father's will, was not proved.⁵

Succession by
a brother to
the exclusion
of sons.

Partition of
ancestral prop-
erty in
father's life-
time.

¹ *Musst. Berogah Moye v. Nuhokissen Ray* 2 *Sevestre* 238 p. 243 (1863). See also another case at p. 240 *Idem* foot note: *Keshub Chunder Ghose v. Bishnupurshad Bose* decided 13 Decem. 1863. ² 8 All. 646 (1886). ³ *Ram Das v. Chandra Dassia* (1886).

20 Cal. 409 (1892). See *Fanindra Deb Raiket v. Rajeswar Das* 12 I. A. 72 (1885).

⁴ 2 S. D. Sel. Rep. 249 (321) [1818].

⁵ *Jugomohan Das v. Sir Man-guldas Nathubhai* 10 Bom. 628 (1886).

Succession to
mafee-birt
tenures.

Whatever the words *mafee-birt* tenure may have implied originally, the *prima facie* meaning of the words has come to be an "hereditary tenure." Where ancestral property has apparently descended in the ordinary way of Hindu property, first to the son, and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case, and show by some custom that that was the proper construction of the grant. Where the original donee of a service tenure ceases to do any service and pays in lieu of a rent which his descendants continue to pay, the condition of the tenure become altered from service to rent.¹

Tenant right.

In the absence of any evidence of a special custom a nephew should not inherit the tenant right from an uncle whose legal heirs were his sons; nor could the latter transfer their right of inheritance to their cousin, or confer on him such a right by consenting to his occupation of the land.²

Rule of suc-
cession among
illegitimate
sons.

By the Hindu law a son not born in lawful wedlock may inherit, if such be the custom of the province, but not otherwise. Among the *Nagur* Brahmans in Benares for instance, it was alleged in a case that such custom had existed, but the allegation was not established and the evidence proved the contrary.³ But in the case of an illegitimate son by an adulterous intercourse, a custom recognizing his right of heirship would be regarded as bad custom, and, as such, would not be given effect to.⁴

Where parties are actually married, it is a fair presumption that the husband is father of the issue of his wife, but where a person is born of wedlock, the clearest evidence should be adduced to establish the fact of parentage. Thus, where a son, born in wedlock of a Rajput

¹ *Rajah Mahendra Singh v. Jokha Singh* 19 W. R. 211 (P. C.) [1873].

² *Omrao Singh v. Pertab* 3 N. W. P. (Ag.) 113 (1868).

³ *Mokin Singh v. Chumun Rai* 1 S. D. Sel. Rep. 28 (1799).

⁴ *Narayan Bharthi v. Laxing* 2 Bom. 140 (1877).

Rajah by a Sudra woman, claimed that the Rajah having died without male issue, he, by the custom of the family, was entitled to inherit the deceased Rajah's property, the Court rejected his claim as there was no sufficient proof that the late Rajah was his father.¹

An illegitimate son of any of the three regenerate castes by a Sudra woman cannot succeed to the inheritance of his putative father. But he is entitled to maintenance out of his deceased father's estate.² This right of maintenance is a right personal to the illegitimate son and not inheritable by his offspring.³ An assignment to the illegitimate son by his father, before the birth of a legitimate son and heir, an ancestral immoveable estate for the purpose of his maintenance, has been held to be valid.⁴ Among Gujrati Jains who have settled in Belgaum and who are considered as Vaisyas, an illegitimate son is entitled to maintenance only.⁵ In a very recent case it has been held that the father of an illegitimate child is bound to provide for its maintenance. A suit lies in the Civil Court for maintenance of an illegitimate child notwithstanding an order of the Magistrate under section 488 Cr. P. C.⁶

In the case of the Sudra class, illegitimate children are qualified to inherit from their father.⁷ But the son of a Sudra

Among
regenerate
classes.

Among
Sudras.

¹ *Prshad Singh v. Rani Munesree* 3 S. D. Sel. Rep. 132 (176) [1821].

² *Pershad Singh v. Rani Munesree*, 3 S. D. Sel. Rep. 132 (176) [1821]; *Chuoturya Run Mundun*

Syn v. Saheeb Purhulad Syn, 7 Moo. I. A. 18 (1857); *Moonnee*

Ram v. Pirthee Singh, N. W. P. Decis. (Sel. cases) 491 (1857);

Pandaiya Telavar v. Puli Telavar, 1 Mad. H. C R. 478 (1863); *Rajah*

Parichat v. Zalim Singh, 4 I. A. 159 (1877); *Roshan Singh v. Bulwunt Singh*, 22 All. 191 (P. C.) (1899); *Ambabai v. Govind*, 23

Bom. 257 (1898); *Rahi v. Govinda* 1 Bom. 97 (1875); *Rungadhar v. Juggernath*, 1 Shome 92 (1877).

³ *Roshan Singh v. Balwunt Singh*, 22 All. 191 (P.C.) [1899]; s. c. 4 C. W. N. 353.

⁴ *Rajah Parichat v. Zalim Singh*, 4 I. A. 159 (1877).

⁵ *Ambabai v. Gorind*, 23 Bom. 257 (1898).

⁶ *Ghana Kanta Mohanta v. Ghereli*, 32 Cal. 479 (1904).

⁷ *Chuoturya Run Murdum Syn v. Sahub Purhulad Syn* 7 Moo. I. A. 18 (1857); *Goordyal v. Raju Ram*, N.W.P. Decis

by a slave girl is not entitled to share with his legitimate sons in the inheritance of an uncle by the father's side.¹ To entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been continuous, and not incestuous or adulterous.² Among Sudras, governed by the *Mitakshara*, an illegitimate son does not inherit collaterally to a legitimate son by the same father.³

Regarding the right of inheritance of an illegitimate son among the Sudra class, one uniform rule does not prevail all over India. On the contrary there is a great divergence of rules, as will be seen from the following summaries :—

In Bengal.

In *Narain Dhara v. Rakhal Gain*,⁴ Mitter, J., said : “From an examination of these authorities, it is clear that according to the doctrine of the Bengal school of the Hindu law, a certain description of illegitimate sons of a Sudra by an unmarried Sudra woman is entitled to inherit to their father's property in the absence of legitimate issue—viz., the illegitimate sons of a Sudra by a female slave or a female slave of his slave.⁵ This was followed in another case, which held that the

218 (1865); *Panduiga Telarar v. Pali Telarar*, 1 Mad. H. C. R. 478 (1863) : s. c. in the Privy Council. *I. V. Taver v. R. P. Talever*, 13 Moo. I. A. 141 : s. c. 3 B. L. R. 1 : s. c. 12 W. R. 41 (1869); *Mayna Bai v. Uttararam*, 2 Mad. H. C. R. 196 (1884); *Kesaree v. Samurdhan*, 5 N.-W.P.(All.) 94 (1873); *Chinnamal v. Varadarajula*, 15 Mad. 307 (1891).

¹ *Nissar Murtajah v. Kowar Dhuncunt Roy*, 1 Marshal 609 (1863).

² *Karuppannan Chetti v. Bulokam Chetti*, 23 Mad. 16 (1899).

³ *Skome Shankar Rajendra Fareri v. Rajesur Swami Jaun-*

gov 21 All. 99 (1898); *Sarasuti v. Mannu* 2 All. 134 (1879); *Sadu v. Baiza* 4 Bom. 37 (1878); *Krishnayyan v. Muttusami*. 7 Mad. 407 (1883); *Nissar Murtajah v. Kowar Dhuncunt Roy* 1 Marshal 609 (1863); *Rajah Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingji* 17 I. A. 128 (1890) s. c. 18 Cal. 151.

⁴ 1 Cal. 1 (1875).

⁵ *Bulbhuddur v. Rajah Jugger-nath Sree Chundun Mahapatra*, 6 S. D. Sel. Rep. 296 (372) [1840]; *Rajah Janurdhun Ummer Singh Mahendra v. Obhey Singh Ibid* 42 (49) [1840].

son of a Sudra by a kept woman or continuous concubine does not inherit his father's estate.¹ The Privy Council, however, have held that an illegitimate son is a co-parcener of his father's legitimate son and where the only legitimate son of a deceased Rajah had succeeded to an impartible Raj and died without leaving any male issue, his illegitimate brother was held to be entitled to succeed under the *Mitakshara* by survivorship. The family belonged to the Sudra caste. But this principle of survivorship was not extended to the case of other collateral heirs.²

In the N. W. Provinces an illegitimate son of a Sudra (a Jat for instance) by a woman of unequal caste cannot inherit paternal property.³ Illegitimate son does not inherit collaterally to a legitimate son by the same father.⁴

The general result of authorities, both judicial and forensic, is that among the three regenerate classes in the Bombay Presidency illegitimate children are entitled to maintenance, but cannot inherit unless there be local usage to the contrary. Among the Sudra class illegitimate children, in certain cases, at least, do inherit.⁵ The sons of a *punarbhū* (twice-married woman) by a duly contracted *pat* marriage i.e. in accordance with the custom of the caste, are legitimate, and as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.⁶ In a recent case it has been held that among Sudras the sons of the illegitimate son of a person by a kept mistress are entitled to share with the sons of legitimate sons.⁷

¹ *Kirpal Narain Tewari v. Sukumoni* (Widow of Bhopal) 19 Cal. 91 (1891). See also *Ramasaran v. Tekchand*, 28 Cal. 194.

² *Rajah Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanand Mansingji*, 17 I. A. 128 : 18 Cal. 151 1890.

³ *Khooshal Singh v. Rao Omrao Singh*, 7 N. W. P. Decis Part II

320 (1864).

⁴ *Shome Shanker Rajendra Vareri v. Rajeswar Swami Jangow*, 21 All. 99 (1898).

⁵ *Rahi v. Gorinda Valad Teja*, 1 Bom. 97 (1875).

⁶ *Ibid.*

⁷ *Fakirappa v. Fakirappa*, 4 Rom. L. R. 809,

In Madras.

In Madras bastards succeed their father by right of inheritance.¹ But an adulterous or incestuous intercourse with the mother of the son is a bar to such a right of the son.² Where the illegitimate son is the offspring of mixed classes between the second and third of the regenerate classes, he has no title to inherit, and the circumstance that his father was illegitimate does not help him.³ An illegitimate son is not entitled to a share in the property of his father's brother's sons.⁴ An illegitimate son of a Sudra by his concubine is his heir in preference to a brother's son.⁵

Among prostitutes.

Under the Hindu law prostitute daughters living with their prostitute mother succeed to the mother's property in preference to a married daughter, because the relation of the latter to her outcaste mother has been severed.⁶ Following this principle the Madras High Court held that as between the sister of a prostitute associated with her in her degraded condition and her brother who remained in caste and treated his sisters as outcastes, the right to succeed to the estate of a deceased prostitute sister lay with the prostitute sister in preference to the brother.⁷ This case has been distinguished by the Calcutta High Court in *Sarna Moyee Bewu v. The Secretary of State*.⁸ There their Lordships say that by lapsing into prostitution a Hindu woman becomes degraded and outcaste but does not cease to be a Hindu, and the Indian Succession Act (Act X of 1865, section 331) cannot therefore apply to the

¹ *Pandaiya Teluar v. Pali Teluar* 1 Mad. H. C. R. 478 (1863).

² *Datti Parisi Nayudu v. Datti Bangaru Nayudu* 4 Mad. H. C. R. 204 (1869); *Venekata Chella Chetti v. Parathammal* 8 Mad. H. C. R. 134 (1875); *Viraramathi Udayan v. Singaravelu* 1 Mad. 306 1877; see also *Karuppannan Chetti v. Bulokam Chetti* 23 Mad. 16 (1899).

³ *Sri Gujapaty Hari Krishna Devi Garu v. Sri Gujapati Radika Putta Maha Devi Garu* 2 Mad. H. C. R. 369 (1865).

⁴ *Karuppa Goundan v. Kumara-sami Goundan* 25 Mad. 429 (1901).

⁵ *N. Krishnamma v. N. Pappa* 4 Mad. H. C. R. 234 (1869).

⁶ *Tara Munnee Dassee, v. Motee Buneane v. Heera Buneane* 7 S. D. Sel Rep. 273 (325) [1846].

⁷ *Sirasangi v. Minal* 12 Mad. 277 (1888).

⁸ 25 Cal. 254 s. c. 2 C. W. N. 97 (1897).

succession of her property. A sister is no heir to a female proprietor under the Bengal school of Hindu law, and if they both lapse into prostitution, one does not thereby become an heir of the other.

In *Kamini Money Bewah*¹ it was held that the general rule, *viz.*, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste, applied even with greater force as between her and the members of her husband's family. Those members therefore have no right of inheritance in property acquired by a woman who left her husband's family and lived as a prostitute.

In a very recent case a brother's son of a deceased prostitute applied for letters of administration to her estate. The deceased acquired her estate by prostitution. Following the above rulings his application was rejected.²

As a matter of private law the class of dancing women being recognized by Hindu law as a separate class having a legal *status*, the usage of that class, in the absence of positive legislation to the contrary, regulates rights of *status* and of inheritance, adoption and survivorship.³ Where a hereditary office of dancing girls attached to a *pugoda* passed to two sisters on the death of their mothers, on the death of one of the sisters, the daughter, and not the sister of the deceased, would succeed to the office and effects of the deceased.⁴ An adopted niece, (a dancing girl) succeeds to the property of a prostitute dancing girl at her death in preference to the latter's own brother remaining in caste.⁵ According to the custom of the *bogam* or

Among dan-
cing girls.

¹ 21 Cal. 697 (1894).

¹² Mad. 214 (1888).

² *Bhutnath Mondal v. Secretary of State* 10 C. W.N. (1085) (1906). See Woodroffe J.'s. view at p. 1086.

⁴ *Kamakshi v. Nagubrahm* 5 Mad. H. C. R. 161 (1870).

⁵ *Narasanna v. Gangi* 13 Mad. 133 (1889).

³ *Muttukanna v. Paramasami*

dancing girl caste in the Godavari District, property left by a mother is divided between the sons and daughters.¹

West J., in *Mathura Naikin's* case,² held that the adoption by Naikins cannot be recognized by law and confers no right on the person adopted. As *Mathura Naikin* sought to recover a share of the property in the hands of her adoptive mother, non-recognition of the custom of adoption took away the ground of her claim. And further, though the daughters succeed to their mother's property, they cannot call for a partition during her life. That is a right peculiar to the son and grandson as joint owners by birth with the father of the ancestral estate. His Lordship made strong observations on the practices and usages of the Naikins by which they endeavour to make their class and its mischievous influences perpetual. Such usages being directly opposed to the laws of God, should be regarded as invalid and inoperative.

In *Tara Naikin's* case³ it was held that inasmuch as the existence in India of dancing girls in connection with Hindu temples is according to the ancient established usage, the Court would not be justified in refusing to recognize existing endowments in connection with such an institution. Accordingly, where an adopted daughter of a dancing girl attached to a temple sued to redeem and have her right recognized to manage the *inam* lands assigned as remuneration for the temple office, the Lower Court rejected her claim on the ground that the adoption could not be recognized by the Civil Court. But the High Court allowed her suit and held that the lands in question were not claimed as being the property of the last incumbent, but as a part of the endowment of the temple of which she had been the manager. The alleged adoption only had effect as nominating the plaintiff to be successor

¹ *Chandrareka v. Secretary of State* 14 Mad. 163 (1890).

4 Bom. 545 (1880).

² *Mathura Naikin v. Esu Naikin* 14 Bom. 90 (1897).

³ *Tara Naikin, v. Nana Lakshman*

in the management, and it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should nominate her successor. The Courts of Law could not refuse to recognize it, such custom being recognized in the country.

CHAPTER VIII.

HINDU CUSTOMS.

MARRIAGE AND DIVORCE.

According to family, caste, local and tribal customs, various descriptions of marriage are prevalent amongst Hindus and those who are not strictly speaking Hindus. These customary forms of marriage, when duly performed, are as valid and binding as any marriage celebrated in orthodox or regular form. British Courts are bound to recognize such customary marriages if custom is satisfactorily established. We will note below some of these customary forms of marriages which have received recognition from our courts.

Mookhochandrika and Santigrihita.

Among the Tipperah Rajahs two species of marriages prevail. One species is called *mookhochandrika*, by which marriage takes place by mutual interchange of glances between the bridegroom and the bride according to the *Shastras* in the orthodox fashion. The other species is performed according to the *Gandharva* form, by the worship of the goddess Tripura and taking *santi* water. The ceremony of the latter species of marriage is described as follows :— “ According to the custom prevailing in Tipperah, the worship of the goddess of Tripura is performed, then the priests present garlands and sandal wood powder to the Rajah and Rani, who then receive *santi* water (water of absolution). ” This is called *santigrihita*.¹

In *Rajkumar Nobodip v. Rajah Birchunder*² Mr. Justice Morris observed thus :—“ It is manifest that the people of Tipperah, from the Rajah downwards, are very primitive, and that in their manners and customs, they by no means

¹ *Chukrohdhuj Thakoor v. Beer* (1864).

² *Chunder Juhraj*, 1 W. R. 194 * 25 W. R. 404 at 411 (1876).

follow the strict tenets of the Hindu religion. The *gandharva* or *santigrihita* form of marriage is commonly adopted. It is simple in character and requires little ceremony. At the same time a marriage in this form is binding and perfectly valid." A son of a *Kachua* Rani may become a Rajah. It is in evidence that Rajah Ramgunga Manick, Kassy Chunder and others were born of *Kachuas*.¹ Since a Rajah can make any *Kachua* (or slave girl), whom he loves, his Rani, it has been held that, according to the law and custom of marriage prevailing in Tipperah, the Rajah can legitimise his children born of a *Kachua* by going through a marriage ceremony with the mother.²

Among the Chiefs of the Tributary Mahals in Cuttack there is prevalent a kind of marriage known as *phoolbibahi*, a description of which will be found under Family Customs.³

The *Asura* form of marriage is one of eight distinct kinds of marriage mentioned by Manu.⁴ According to this sage, "When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that form is called *Asura*.⁵ Yajnavalkya has described it to be a marriage "contracted by receiving property from the bridegroom."

The essential characteristic of the *Asura* form of marriage appears to be the giving of money or presents by the bridegroom or his family to the father or parental kinsmen of the bride, or, in fact, a sale of the girl by her father or other relation having the disposal of her in marriage in consideration of money or money's worth paid to them by the intended husband or his family."⁶ This

¹ *Chakrodhuj v. Beer Chunder*
1 W. R. 194. (1864).

² *Ibid.*

³ *Vide Supra* p. 59.

⁴ *Vide Manu III, 21-41.*

⁵ *Manu III, 31.*

⁶ In the goods of *Nathubai Jaikisondas Gopaldas*, 2 Bom. 9 p. 13 (1876); *Vijiarangam v. Laksheeman*, 8 Bom. H. C. R. O. C. J. 244 (1871).

species of marriage is peculiar to the *Vaishya* and *Sudra* castes, i.e., mercantile and servile classes in Bombay.¹ According to Sir T. Strange, it is questionable whether in Southern India any other form than the *Asura* be now observed.²

Amongst Hindus of the Bhandari and other inferior castes the *Asura* form is more customary than the four approved forms of marriage.³ Among the Nagar Vissa section of the *raria* caste, the form of marriage in use corresponds with one or other of the approved forms and not to the *Asura*, and the giving of *palu* does not constitute a purchasing of the bride.⁴ The money given to the bride's father is variously known as *palu*, *dez*, *pon*.

Gandharva
form.

Gandharva is the sixth form of marriage mentioned by Manu.⁵ "The reciprocal connection of a youth and a damsel with mutual desire is the marriage denominated *Gandharva*, contracted for the purpose of amorous embraces and proceeding from sensual inclination."⁶ This form of marriage is still prevalent among Rajahs and Chiefs. The ceremony observed at the marriage consists in an exchange of garlands of flowers between the bride and the bridegroom without a nuptial rite, *homam*, and without the customary token of legal marriage, called *pustelu* being tied round the neck of the bride. Sir William Macnaughten also says: "The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no ceremonies are necessary, and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, a reciprocal amorous agreement, would be sufficient to establish such a marriage if corroborated by any word or deed on the part of the man."⁷ But according to Hindu texts the religious

¹ Vide Steele's *Summary* p. 31.

⁴ *Nathubai* 2 Bom. 9 (1876).

² Strange, Vol. I. 43; Bannerjee's

⁵ *Manu* III. 21-41.

Tagore Lec. p. 84.

⁶ *Manu* III. 32.

³ *Vijiarangam v. Laksheeman*,
8 Bom. H. C. R., O. C. J. 244,
(1871).

⁷ Macnaughten's *Principles of
Hindu Law*, p. 61.

element appears to be indispensable to a valid *Gandharva* marriage.¹

In *Bhaoni v. Maharaj Singh*² it has been held by the Allahabad High Court that a marriage by the *Gandharva* form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the *status* of a wife and making the offspring legitimate.

The Calcutta High Court, in *Rajah Hainnum Chull Singh v. Kumar Ghunshiam Singh*,³ decided that amongst Kshatryas *Gandharva* marriage was valid. It also prevails among the Rajahs of Tipperah.⁴ The Madras High Court held that, in order to constitute a valid marriage in *Gandharva* form, nuptial rites are essential.⁵

Anuloma was a form of intermarriage prevalent in ancient days, by which a Brahman was at liberty to marry four wives, viz., a Brahman wife, a Kshatrya wife, a Vaishya wife and a Sudra wife. A Kshatrya was entitled to have three, viz., a Kshatrya wife, a Vaishya wife and a Sudra wife. A Vaishya was permitted to have two, viz., a Vaishya wife and a Sudra wife. The offspring of *Anuloma* marriage, where the mother was of a caste inferior to that of their father, were not of equal caste to their father, but were allowed to inherit their father. Though *Anuloma* union with women of inferior castes was permissible, yet its reverse viz., *Pratiloma* union, that is to say, the union of a man of inferior varna or caste with a woman of superior varna, was a prohibited connection and the issue of such connection was called *Pratilomaja* and had no right to his father's estate and was entitled to mainte-

*Anuloma
marriage.*

¹ Devala 4; Colebrook's Digest 370; *Nirnaya Sindhu*, Ch. III 37; Shyamacharan's *Vyavasta Darpana* 702.

² 3 All. 738 (1881).

³ 2 Knapp 203 (1834).

⁴ *Chackradhuj Thakoor v. Beer Chunder Jubraj*, 1 W. R. 194 (1864).

⁵ *Brindacana v. Radhamani*, 12 Mad. 72 (1888).

nance only.¹ But in the *Kolijngu* intermarriage between different castes is prohibited.²

Kurao marriage. *Kurao* marriage prevails amongst the Jats, Goozars and Aheers in the North-Western Provinces. The marriage is also known as *Kerao*, *Kaje*, *Dhericha* or *Dhareyya*³ marriage. This form of marriage is inferior to *Shadee*, or marriage with a maiden, and is generally contracted with a widow and attended with some ceremonies.⁴ Among the Jats the marriage of a widow with the brother of a deceased husband is common and recognized as lawful. According to Sir Henry Elliot, an authority of much weight regarding the tribes and customs of the people of these provinces, children born in *Kurao* are considered legitimate and entitled to inheritance accordingly.⁵

The ceremony of *Kurao* being of equal validity as that of the *Biaik* or *Shadee* the sons of the former inherit their father's estate equally with the sons of the latter.⁶ There is no custom, however, among the Jats sanctioning their union with the women of unequal caste by the ceremony of *Kurao* or *Dhericha*, consequently the sons of such union cannot succeed to their father's estate. The custom of *Kurao* is prevalent among the Lodh caste, but in the life-time of a wife by regular marriage it can only take place with the consent of the brotherhood.⁷

¹ Dyabhagha Chap. IX.; Manu X, 5-29; Mitakshara Chap. I. S. VIII, V. 2-4. Sir Gooroodass Banerjee's Tagore Lectures p. 157. 2nd. Edition and also 17 Mad. 422 at p. 437.

² Vyavastha Darpana pp. 14, 15; Manu General Note VI.

³ *Dhareyya* means the second husband of a Hindu widow among the lower classes. Vide Shakespear's Dictionary, quoted at p. 328 N. W. P. Decis. Part II. (1864).

⁴ The ceremony being "making

the bride's head with *minim*"—Vide N. W. P. Decis. Part II. (1864) p. 328.

⁵ *Purunmull v. Toolseeram* 3 Ag. H. C. R. 350 (1868); *The Queen v. Bahadur Singh* 4 N.W.P. (All.) 128 (1872); *Khooshal Singh v. Rao Omrao Singh* N. W. P. Decis. (1864) Part II 320.

⁶ *Konwar Kisken Singh v. Konwar Golab Singh* N. W. P. Decis. 173 (1861).

⁷ *Kesaree v. Samardhan* 5 N. W.P. (All.) 94 (1873).

For a woman to contract a second marriage during the life-time of her first husband is invalid and criminal, but sometimes, under custom, such a marriage is rendered valid and non-criminal. A woman of the caste of Mehter in the district of Monghyr married another man of the same caste while her former husband was alive. She alleged that in her caste, as well as in other low castes, it was customary for women to leave their husbands at any time and marry other men and that she had left her former husband because he failed to provide for her properly. The Sessions Judge found her guilty under section 494 I. P. C., but the High Court, finding that such marriages are not uncommon among the Mehter caste, and the second marriage in consequence not being void, set aside the conviction.¹

Re-marriage
of a woman
during the
life-time of
her husband.

Such second marriage of a wife or a widow is known amongst the Marhattas as *Pat*, and in Gujarat as *Natra* marriage.² Caste rules allow a woman to contract a *Natra* during the life of her first husband.³ In *Kursan Gaja*⁴ a custom prevalent among the Talapoda Koli caste in Surat was set up, to the effect that a woman should be permitted to leave the husband to whom she has been first married and to contract a second marriage (*Natra*) with another man in his (the first husband's) life-time and without his consent. But the Court considered such caste custom invalid, "being entirely opposed to the spirit of Hindu law," and the second marriage null and void. This was a criminal case and the Court went so far as to lay down that such a caste custom, even if it were proved to exist, would be invalid as *being entirely opposed to the spirit of the Hindu law*. This case was distinguished in another

Pat and
Natra mar-
riage.

¹ *Musst. Chania*, 7 C. L. R. 354 or *shadee* or *lagan* wife.

(1880).

² *Hurka Shunkur v. Bacjee Munohur* 1 Borr. 391 (1809).

³ *Pat* wife is also called *udki* wife i. e. widow remarried. A maiden married is known as *biah*.

⁴ 2 Bom. H. C. R. 124 (1864).

Bombay case¹ where the defence set up the custom of *Natra* in answer to the charge of adultery. Couch C. J., observed that the guilt or innocence of the accused depended on his good faith. Did he or did he not believe *honestly* that he was at liberty to marry the woman.

In a later case, which was decided on the civil side of the Bombay High Court, the Court held that the custom which authorized a woman to contract a *Natra* marriage without a divorce, on payment of a certain sum to the caste to which she belonged, was an immoral custom and one which should not be judicially recognized.²

In another case the parties were Sompura Brahmans, and the woman remarried in the life-time of her first husband without his consent. It was held that she could not be regarded as the lawful wife of her second husband and was only entitled to maintenance as his concubine from his estate. Westropp C. J., observed thus:— “We concur in the opinion of the Judge of the Court of Small Causes at Ahmedabad that plaintiff Khemkor cannot be regarded as the lawful wife of Ranchhor Panachand, she having married him in the life-time of her husband without the consent of that husband. We reserve our opinion as to whether, even if he had given his consent to her marriage to Ranchhor, such a circumstance would have validated the marriage.”³

The term *Natra* also applies to a man contracting a second marriage in the life-time of his first wife. A rather curious case is to be found in Borrodaile's reports. A betrothed his daughter to B, who having lately contracted a second marriage (*Natra*) with another woman, A sued B, either to consent to a divorce from his daughter, or to dissolve the *Natra* and admit his daughter to her rights. B asserted that he was full grown and A's daughter

¹ *Manohar Raiji*, 3 Bom. H. C. R. C. C. 17 (1868).

² *Khemkor* (widow of *Ranchhor*) v. *Umia Shankar Ranchhor* 40 Bom. H. C. R. 381 (1873).

³ *Iji v. Hathi Laln* 7 Bom. H. C. R. A. C. J. 133 (1870).

had not arrived at years of puberty, and under the circumstances *Natra* was permitted by the rules of their caste. The Sudder Adawlut, having consulted their Law Officer and obtained further evidence from the caste both in Bombay and Gujrat, decreed that A had no right either by the laws of the *shastra*, or customs of his caste, to demand a divorce for his daughter.¹

In another case the husband after his first marriage contracted *Natra* with another woman whom he brought into his house. He insisted on his first wife coming and co-habiting with him in the same house and, in fact, obtained an order from a criminal court to that effect. The first wife therefore brought a civil suit claiming a divorce from her husband or a repudiation by the husband of his *Natra* wife. The parties belonged to the *Gundhurree* caste, or "Musicians and Singers." The first wife alleged that according to the caste custom no man should marry a second time during the life of his first, unless she were barren or blind, or had other material defect, and that her husband must either divorce her or repudiate the *Natra* wife, as bigamy was not permitted. Her allegation was supported by the evidence of her caste people who said that, if there were cause, a man might keep two wives, but not so if no reason existed for doing it. If both the wives agreed he might keep them both; if not, the husband must grant a divorce (*farighkhut*) to the dissentient one. The Court decided that the wife was entitled to a divorce.²

Among the common labouring class of *Koonbees* or cultivators of the soil, a person of good family marries his daughter to one of equal rank, and if the girl be very young the husband may wed another wife. The father can only prefer his suit for his daughter's divorce to the

¹ *Huree Bhare Nana and Son v. Bhugoo v. Nathoo Koober* 1 Borr. 65 (1814). ² *Maha Shunkur Khooshal v. His wife Musst. Oottum* 2 Borr. 572 (1822).

Sirkar, but has no right to insist on what her husband is alone capable of doing.'

Sugai or
Shanqu
marriage.

Sagai is a form of marriage prevalent in Bengal and Behar, and resembles *Pal* or *Natra* of Bombay and Gujerat, and *Kurao* of the N.-W. Provinces and the Punjab. Like the latter, *Sagai* is practised in the re-marriage of widows or of a woman whose husband is alive. It is confined to the lower class and not attended by any religious ceremonies. The Brahmans do not officiate at the *Sagai* marriage. The main ceremony, in Behar, for instance, is the putting of a red or *sindur* mark on the forehead of the bride in the presence of assembled friends and relatives. In the case of the re-marriage of a woman in the life-time of her first husband to another man of the same caste, the woman has to pay some fine to the Punchayet to restore her to caste. The payment of that fine appears to have the effect of a dissolution of the first marriage and a legalization of the subsequent co-habitation. In Behar numerous low castes, such as Koires, Dosads, Gowalahs, Telees and others, solemnize the marriage of their widow in the *Sagai* form, which has long been and is still prevalent and considered in every way as valid as *Biahi* or first marriage.³ In the district of Midnapore re-marriage of widows amongst the Nomosudras in the *Shunga* or *Sagai* form is customary and the Bengal High Court has recognized such custom as valid.⁴ In Chota Nagpore, among some aborigines, the widow-ge-marriage is permissible and the younger brother generally marries his elder brother's widow in *Sagai* form.⁵ Among the *Halwace* caste a man may contract a marriage in the

¹ *Hurree Bhare Nana v. Nuthoo Kooper* 1 Borr. 65 p. 74 (1814).

Bissuram Koiree, 3 C. L. R. s.c. 13 C. L. R. 207.
410 (1878); **Kallychurn Shaw v. Dalton's Descriptive Ethno. of Dukhee Bibee**, 5 Cal. 692 (1879) : **Bengal** p. 138.
s. c., 5 C. L. R. 505 : s. c. 3 Shome 81.

Sagai form with a widow, even if he has a wife living, provided that the wife be childless.¹

Practically there is no distinction between a *Sagai* wife and a *Biahi* wife in regard to her position in the family. Both marriages are good and valid. No distinction is made between the issue of a *Sagai* marriage and a *Biahi* marriage. It has been held that the issue of the son of a *Sagai* wife first married is entitled to inherit the property of the grandfather in priority to the issue of a subsequent *Biahi* wife.² *Sagai* wives are legal wives of their husbands, inasmuch as persons committing adultery with them are punishable under the law.³ Except in respect of participation in oblations to the gods the position of a *Sagai* wife differs in no respect from the position of a wife married in the ordinary *Biahi* form. She may not wear *shanka* (shell bangle worn by a married lady) or take part in cooking or distributing food at a festival. But in respect of the legality of such marriage, and the legitimacy of the children of such marriage, both *Sagai* and *Biahi* stand in the same footing.⁴

Distinction
between
Sagai and
Biahi
marriage.

We have mentioned under Caste Customs that among the lower order of Hindus a re-marriage of widows is prevalent and recognized by customs of the caste. *Pat* and *Natra* marriages prevailing in Bombay and Gujerat, *Sagai* or *Shunga* obtaining in Bengal and the North Western Provinces and *Kurao* in the Punjab afford abundant instances. By Act XV of 1856 a Hindu widow of any, caste, high or low, is now competent to contract a second marriage, and such a marriage is valid, one of the legal consequences of such re-marriage being that the widow

Remarriage
of Widows
according to
caste custom
Forfeiture of
Property.
Act XV of
1856.

¹ *Kallyohurn Shaw v. Dukhee* (1863).

Bibee, 5 C. L. R. 505 (1879); s. c. 5 Cal. 692 : s.c. 3 Shome 81.

² *Radaik Ghaserain v. Buduik Pershad Singh*, 1 Marshal 644

³ *Bissuram Koiree*, 3 C. L. R. 410 (1878); *Jukni*, alias, *Parbati*, 19 Cal. 627 (1892).

⁴ 3 C. L. R. 412.

thereby forfeits all rights of inheritance to her former husband's estate.

The principle on which a widow takes the life-interest of her deceased husband, when there is no male heir, is that she is a surviving portion of her husband.¹ By remarrying she ceases to be such and therefore her right of enjoyment of her former husband's estate ceases also. She becomes dead, as it were, in respect to her interests in her deceased husband's estate. Previous to the passing of the Act XV, a Hindu widow forfeited her rights and interests in her deceased husband's estate only in case of her incontinence at the time when succession opened. Her subsequent unchastity did not divest her of the estate already vested in her.² It should therefore be necessary to investigate how far the Act would affect the rights of a Hindu widow who marries according to her caste custom. We may state at the outset that there is a clear and absolute difference of opinion on this important question in the decisions of the High Courts in India. The Allahabad High Court holds the view that a widow marrying a second time according to her caste custom and independently of Act XV of 1856 is not deprived of her right to her deceased husband's estate, whereas the Courts at Calcutta, Bombay and Madras hold that she does forfeit on her re-marriage. The following cases will illustrate the different views held by different Courts.

Allahabad
High Court.

The Allahabad High Court held that Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to re-marry who could not previously have done so, and section 2 of the Act applied to such persons only. So, when a widow, belonging to the sweeper caste, re-married according to her custom, she did not thereby forfeit her interest in the

¹ Vide *Smriti-chandrika* Ch. XI
s. 1 § 4.

² *Kerry Kolitanee v. Monee Ram Kolita*, 19 W. R. 367 (F.B.) [1873].

property left by her first husband.¹ The same Court followed this ruling in a recent case. There the widow who contracted a second marriage belonged to the *Kurmi* caste, a re-marriage of widows being permissible by the custom of that caste.² Their Lordships after referring to many reported and unreported cases said : " We see no reason to doubt the soundness of those decisions which form, as far as we know, a consistent *cursus curiae* in this court." But see *Matadeen v. Musst. Soohy* which was decided by the Sudder Court. There a widow, of the *Koormee* caste, married a second time and sued to obtain possession as heiress to her deceased husband's share in an estate. The Court held that both by Hindu law and section 2, Act XV of 1856, she had forfeited all right to succeed as heir to her deceased husband's estate.³

The earliest case in which the High Court at Calcutta considered this Act XV of 1856 was *Akora Suthi v. Boreani*.⁴ Therein it was held that the right of the mother to succeed as to her deceased son is not destroyed by reason of her having contracted a second marriage. Then in *Malungini Gupta v. Ram Rutton Roy*,⁵ a Full Bench (by a majority) held that a Hindu widow forfeited all her interests in her first husband's property when she subsequently took a second husband, and this result followed even when re-marriage might be customary in the caste. A division Bench in *Rasul Jehan Begum v. Ram Sarun Singh*,⁶ expressed a strong opinion on the subject. Here the widow belonged to the *Agarhari* caste, and married a second husband. The Court held that although according to the custom prevailing in her caste a re-marriage was

Calcutta
High Court.

¹ *Har Saran Das v. Nandi*, 11 All. 330 (1889).

² N. W. P. Decis. Part I. (1864) p. 434.

³ *Ranjit v. Radha Rani*, 20 All. 476 (1893). See also *Dharam Das v. Nand Lal Singh*, Weekly Notes (All.) 1889, p. 78.

⁴ 11 W. R. 82 (1868); s. c. 2 B. L. R. 199.

⁵ 19 Cal. 289 (F.B.) [1891].

⁶ 22 Cal. 589 (1895).

permissible, she forfeited the estate inherited from her former husband.

Bombay
High Court.

The Bombay High Court in *Parnati v. Bhiku*¹ held that a widow duly re-married would cease to have any right to recover or hold any part of the property of her deceased husband. In *Omkar*² it was held that re-marriage was equivalent to the civil death of the widow by reason of the operation of section 2 of Act XV of 1856, and this operation extended to the forfeiture of interests in possession as also in respect of rights still unrealized. In *Vithu v. Govinda*,³ a Full Bench held that even in castes where re-marriage was permitted by caste usage, a Hindu widow, who may have inherited property as heir to her son, forfeited her rights to such property after she re-marries, and the property passes to the next heir. This ruling was based upon what may be described as a liberal construction of section 2 of Act XV of 1856. In *Panchappa v. Sanganbasawa*,⁴ the Bombay Court, after reviewing all these cases and similar cases of other High Courts, ruled that a Hindu widow, after her re-marriage, has no power to give in adoption her son by her first husband, unless he has expressly authorized her to do so. The only case in which a contrary view was held was *Parekh Ranchor v. Bai Bhakat*,⁵ which corresponded with the view expressed in *Har Saran Das v. Nandi*⁶ by the Allahabad High Court.

Madras High
Court.

In *Murugyi v. Piramakli*,⁷ where a widow of the *Maraver* caste re-married, the Madras High Court, applying the principles of Hindu law, held that she had no claim to the property of her first husband. Their Lordships observed "So far as the enquiries extended which are embodied in Steele's Hindu Castes, it appears that it is the practice of a wife or a widow among the Sudra castes of the

¹ 4 Rom. H. C. R. A. C. J. 25 (1867).

² P. J. for 1883 p. 280.

³ 22 Bom. 321 (1896).

⁴ 24 Bom. 89 (1899).

⁵ 11 Bom. 119 p. 130 (1886).

⁶ 11 All. 330 (1889).

⁷ 1 Mad. 226 p. 228 (1877).

Deccan on re-marriage to give up all property to her former husband's relations, except what had been given by her own parents, and we have little doubt that the law in this Presidency will not permit the Hindu widow who has re-married, and who must be regarded as no longer surviving her husband to lay claim to the property left by him, nor in the possession of the daughter who, in default of the widow, is the right heir."

In *Kishun v. Enayut Hossein*¹ the question was whether a woman of the *Aheer* caste had by a second marriage, forfeited her rights to act as guardian to her son by the first marriage. The Court said : "Independent of the strong evidence adduced in favour of the existence of the well-known custom prevailing among the *Aheer* caste, according to which the re-marriage of a widow in no way affects her respectability, status or rights, we hold that Act XV of 1856 supersedes all previous laws founded on the *Shastras* affecting the rights and *status* of a widow on her re-marriage. We are of opinion that section 3 of the above Act should rule the present case. That section distinctly provides that the guardianship of a widow over her own children ceases on re-marriage on application being made to that effect by the relatives of her deceased husband. In this case no such application has been made. We are therefore of opinion that the widow has not forfeited her position as guardian to her son by re-marriage."

Section 2 of Act XV of 1856 does not deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of re-marriage. Sir Barnes Peacock C. J., said : "The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of section 2, I am of opinion that it was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or

Whether a widow marrying according to her caste custom forfeits guardianship to her son by the first husband.

A re-married Hindu widow's right to inherit her son.

interest which she had not at the time of her re-marriage. In *Akorah Soobh v. Bheden Boreanee*,¹ when the widow re-married, the property belonged to her son. It came to her by inheritance from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother, notwithstanding her re-marriage. At the time of her re-marriage, she had no interest in her deceased husband's property by inheritance to her husband or to his lineal successors. It could not therefore cease or determine upon her re-marriage and, if she had died at the time when she re-married, the property would never have descended to her. The Bombay High Court followed this case.²

Marriage between distinct castes how far sanctioned by custom.

Marriage between persons of different castes, or of two sub-divisions of one primary caste, is against the Hindu law.³ To make such a marriage valid, the authority or sanction of a local or special custom is necessary.⁴ Later decisions, however, have held that such intermarriages between sub-sects of Hindus are valid in Hindu law. In *Narain Dhara's* case Mr. Justice Markby doubted the correctness of the view, that such intermarriage is not legally binding. In the case of *Upama Kuchain v. Bholaram Dhobi*⁵ in which the parties were *dhozi* and fisherman by caste, and residents of Sibsagar in Assam, the Court held that there was nothing in Hindu law prohibiting marriage between persons belonging to different sections or sub-divisions of the Sudra caste. In this there was no allegation of any custom; at any rate there was admittedly no evidence of any custom on the record. Their Lordships observed :—

¹ 11 W. R. 82 (F. B.) [1868]; s. c. 2 B. L. R. 199 : s. c. 11 Seves. 151 & 153.

² See *Churan Haree Dalmel v. Kashi* 26 Bom. 388 (1902).

³ See *Anuloma marriage Supra.*

⁴ *Melaram Nudial v. Thanooram, Bamun* 9 W. R. 552 (1868); *Narain Dhara v. Itakhal, Gain* 23 W. R. 334 (1875) : s. c. 1 Cal. I.

⁵ 15 Cal. 708 p. 710 (1888)

"The opinion of Mr. Justice Mitter (in *Narain Dhara's* case) was dissented from by Mr. Justice Markby and the case was not decided on that ground. We further think that the opinion there expressed is inconsistent with the decision of the Judicial Committee of the Privy Council in the case of *Inderun*.¹ The question there was whether the plaintiff, being illegitimate, and therefore, as it was argued, of no caste at all, could contract a legal marriage with a person of the Sudra caste, and their Lordships said : 'Their Lordships are not aware that there is any authority —there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the Pundits.'.... On the whole, seeing that these parties are both of the Sudra caste, and that the utmost that has been alleged really is, that the zemindar was of one part of the Sudra caste; and the lady to whom he was married was of another part; or of a sub-caste, their Lordships held the marriage to have been valid ; to hold the contrary would in fact be introducing a new rule which ought not to be countenanced.'

"The same view was taken in *Ramamani Ammal v. Kulanthai Natchiar*.² There, a similar objection having been taken, their Lordships said : 'On the argument of this appeal this objection was not insisted on ; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the Sudra caste.' We think that these decisions are conclusive as to their being no rule of law rendering, such marriages invalid."

In *Raj Kumari*,³ which was a criminal motion, the Calcutta High Court held that illegitimacy under Hindu law is no absolute disqualification for marriage and that when one or both contracting parties to a marriage are

¹ *Inderun Velungypooly Tacer* 41 : 3 B. L. R. 1.

² *Ramswamy Telacer* 13 Moo. I. A. 346 p. 352 (1871).
I. A. 141 (1869) : s. c. 12 W. R. ⁴ 18 Cal. 261 (1891).

illegitimate, the marriage must be regarded as valid if they are recognized by their caste people as belonging to the same caste. The latest decision on the point is *Haria v. Kanhaya*,¹ which reviewed all the previous cases and held that marriage between two sub-divisions of one of the primary castes is valid and legal according to Hindu law.

In the districts of Dacca and Tipperah marriages between *Vaidya* and *Kayastha* frequently take place and such inter-marriages are recognized by local custom. In a very recent case from Tipperah the Calcutta High Court has held that such marriages are in accordance with local custom and are therefore valid. Their Lordships observed : "The ancient Hindu law did not regard such marriages with the condemnation expressed by later authorities which have been accepted by our Courts so as to make children born from such unequal marriages illegitimate. But however the law may be, there is ample evidence set out in the judgment of the Sub-Judge on which it must be held that such marriages, as in the present case, are recognized by local custom in the district of Tipperah, and there is no instance on which their validity has been questioned. We agree with the Sub-Judge in holding that such marriages are in accordance with local custom in Tipperah and are valid."²

Among Lingayets.

According to the Lingayet religion, marriages between members of different sects of the Lingayets are not illegal. Where it is alleged that such a marriage is invalid, the *onus* lies upon the person making such allegation of proving that such marriage is prohibited by immemorial custom.³

Odareli
marriage.

Among the *Lingayet Goundans* in the Wynnaad there is an immemorial custom by which widows are re-married,

¹ P. R. Vol. XL. 111 p. 326. p. 633 (1903).

² *Ram Lal Sookool v. Akhoy Charan Mitter*, 7 C. W. N. 619. ³ *Fukirganda v. Gangi* 22 Bom. 277 (1896).

and the form in which such a marriage takes place is called *Odaveli* or *Kudaveli* as opposed to *Kalianam* the regular form of marriage. It is not accompanied with the same ceremonies as a *Kalianam* marriage; but a feast is given, the bride and bridergoom sit on a mat in the presence of the guests and chew betel; their cloths are tied together and the marriage is consummated the same night. Widows re-married in this form are freely admitted into society. They cease to belong to the family of their first husband and the children of the second marriage inherit the property of their own father. A widow contracting an *odaveli* marriage ceases to inherit her deceased husband's estate.¹

The second marriage of a wife forsaken by the first husband among the *Lingayets* is called a *serai udiki*, as distinguished from the *lagna* or *dhara*, the first marriage. Such a marriage is sanctioned by custom among the *Lingayets* of South Canara and is valid.²

"Dagger" marriage is a form of inferior marriage prevalent among the Kumbla Zemindars in the Madras Presidency. This sort of marriage takes place in the case of inequality in the caste or social position of the bride. The use of a dagger is an essential of the marriage ceremony. According to some the Zemindar does not appear at the marriage but is represented by a dagger. And, in the presence of this dagger, the *bottu* is tied to the bride. The presence of a dagger and the tying of the *bottu* indicates that this sort of marriage is not exactly a concubinage, but a certain form of inferior marriage which the Rajahs and Princes are accustomed to contract besides marriages in regular form. Ladies united to a Zemindar according to the dagger form are called *bhoga strees*, whereas a lawfully wedded wife is called a *moha stree*.³

¹ *Koduthi v. Madu*, 7 Mad. 321 (1884).

² *Virasangappa v. Rudrappa*, 8 Mad. 440 (1885).

³ *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*,

17 Mad. 422 at pp. 422-425 (1894).

Serai Udiki
marriage.

"Dagger"
marriage.

Andaj
marriage.

Anand is a form of marriage prevalent among Sikhs and corresponds to the Mahomedan *Nika*.¹ It is an inferior form of marriage, which may be celebrated even with a concubine. The ceremony observed at the marriage consists in the recitation of a certain text called the *Anand* text. A son of such a marriage shares equally with another son of the same father by a wife married in the *bahi* or regular form.²

Besides these forms of marriages there are others such as *Bhati* or *Bebhati*,³ *Chudler Andaj*,⁴ *Sarvasvadhanam*,⁵ *Ghari Sufa*.⁶ These have been described in their respective places.

Conditional
Sata marriage

In conditional *sata* marriage two families contract for intermarriage. As, for instance, in the family of A there are available for marriage a boy and a girl, in B's family there are also a boy and girl eligible for marriage. A contract for intermarriage takes place between A's boy and B's girl and B's boy and A's girl—one marriage contract is conditional on the performance of the other. Such intermarriages are prevalent in Bombay and also in Bengal. In the latter province it is known as *paribarta* or exchange marriage, and amongst Brahmans such marriages often take place.

In Borrodaile's Reports a case is reported where a suit was brought to compel the performance of the conditions of a contract between the heads of two families under these circumstances. A contracted to marry his sister to S's

¹ *Nika* is an Arabic term. Its root-meaning is carnal connection. Hence, marriage, i.e. any marriage, first, second or any. The term is used in reference to first and regular marriage. It is among the lower order of people only that *Nika* has obtained the signification of *second marriage*.

² *Deo dem Juggamohun Mullieh*

v. *Satmeemar Beebe*, East's Notes case 31 (29 March 1815) : Morley's Digest, Vol. I. 350.

³ Vide Hindu Customs, Inheritance Supra.

⁴ Vide Punjab Customs Infra.

⁵ Vide Malabar Customs, Infra.

⁶ Vide Mahomedan Customs Infra.

brother-in-law on condition that S should get A married to T's daughter or, failing that, S should give A his own daughter in marriage. A fulfilled his part of the contract, i.e., he married his sister to S's brother-in-law. But S refused to perform his part of the contract and tried to get his daughter married clandestinely elsewhere. T's daughter having died before she attained her marriageable age, A brought this suit to compel S to give him his daughter in marriage ; as he had given his sister only "with a prospect of mutual accommodation." The Court ordered that S should either give his daughter to A, or procure him another wife, or, failing to perform either of these conditions within six months, should pay the sum of Rs. 500. S did not surrender his daughter but paid Rs. 500 as ordered by the Court.¹

In *Bai Ugri v. Patel Purshottam Bhudar*,² the parties belonged to the Kudwa Kunbi caste, and, it was said, were only a month old at the date of their marriage, which was contracted for them by their parents on the following basis : A wished to get B's daughter for his son. A was bound, on condition of B giving his daughter in marriage, to provide a girl for B to marry his son. The marriage, which took place with the usual religious ceremonies, was not to be binding and complete until the bridegroom's father performed the condition, viz., found a girl for B's son. In this case, as the condition was not performed, the marriage was dissolved by the decision of the Pauch notwithstanding that the plaintiff sued for restitution of conjugal rights. Sargent C. J., observed :— "The findings on the issue sent down by this Court on the 28th September, 1891, are, when read together, to the effect that although the usual religious ceremonies

¹ *Atmaram Kessor v. Sheolal* (1892) ; and *Mulji Thakersey v. Mulookohund*, 1 Borr. 397 (1809). ² *Gomti*, 11 Bom. 412 (1887). See also *Bai Ugri v. Patel Purshottam Bhudar*, 17 Bom. 400 (1892).

were performed on the occasion, what took place in *Samvat* 1927 constituted, by the custom of the caste, only a conditional marriage, between plaintiff and defendant No. 1; that the *farkat*, passed by the father in *Samvat* 1936, and which was signed by the plaintiff, operated to cancel the marriage, but that in any case, a dispute having arisen out of the said *farkat*, the decision of the Panch that plaintiff should find a girl to be married to a male member of the family of defendant No. 2, was binding on him, and that the plaintiff's default in doing so dissolved the marriage. It has, however, been contended that the Court ought not to recognize such a custom, as being contrary to public policy. See *Reg. v. Karson Goja*, *Reg. v. Bai Rupa*, 2 Bom. H. C. R. 117; *Uji v. Hathi Lalu*, 7 Bom. H. C. R. A. C. J. 133; *Reg. v. Sambhu*, 1 Bom. 347. All turn upon caste customs by which a woman is enabled to leave her husband and marry another man of her free will or with the consent of the caste and which the Court held to be invalid on the ground that they were immoral as 'legalizing adultery.'

"The question here is of an entirely different nature; as according to the custom relied on, there is no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies (presumably those amongst Sudras) are performed. Such a transaction as took place in *Samvat* 1927 cannot in our opinion be regarded as immoral from any point of view. The parties are in all cases, according to the practice of the caste, of very tender years when such marriages are contracted. The Hindu law leaves it entirely to the parents to marry their daughters and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognize a custom, at any rate amongst the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still

regarded by the parents on both sides as incomplete and conditional marriages.

"In the case of *Boolchand Koleta v. Janokee*, 25 W. R. 386 (1876) which was a suit like the present for restitution of conjugal rights, the Calcutta High Court gave effect to a caste custom by which the usual ceremony of marriage was not regarded as binding unless a second ceremony was performed prior to the woman coming to maternity and cohabiting with her husband, and by which, in default of such ceremony, the woman might after puberty, as the defendant in that case had done, marry another man.

"Upon the whole, we are of opinion that there is no reason for not recognizing the custom as proved in this case, and therefore whether upon the ground of the *farkat* passed by the plaintiff's father or of the plaintiff's default in performing the condition imposed on him by the Panch, we must hold that the plaintiff has not established his right to the restitution of the defendant No. 1 as his wife."

According to Hindu law a betrothal (called *mangni* in Bombay and *pariyam* in Madras) is not to be treated as an actual and complete marriage. It is a promise to give a girl in marriage. Hence a specific performance of a betrothal cannot be enforced. Damages however may be awarded against the father for breach by him of the contract of betrothal.¹ Under the Specific Relief Act, a contract of betrothal cannot be specifically enforced.²

Betrothal or
Mangni or
Pariyam.

With some castes betrothal is irrevocable except for just cause, while, according to others, it can be broken off by mutual consent.³ Where there is a breach of the agree-

¹ *Umed Kika v. Nagindas Narotam Das* 7 Bom. H. C. R. 122 (1870); *Nowbut Singh v. Musst. Lad Kooer* 5 N. W. P. (All.) 102 (1873); *Gunpnt Narain Singh v. Gomti* 1 Cal. 74 (1875); *Mulji Tkakersey v. Gomti* 11 Bom. 142 (1887).

² *Vide S. 21 Cl. (b) Specific Relief Act (Act I of 1877).*

³ *Hurec Bhaec Bhuvaneedas v. Chundun* 1 Borr. 433 (1812); *Umed Kika v. Nagindas Narotam Das* 7 Bom. H. C. R. 122 (1870).

ment of betrothal, the party committing the breach is liable to return to the other party the value of the ornaments and the money paid as *upariyaman* and also to pay some damages for the breach of contract.¹

Breach of a marriage contract is not permitted under any circumstances by the rules of the Parsis. Among them *mangnis* are as equally indissoluble as a perfect marriage.² By the custom prevailing amongst Parsis, presents of money and ornaments made to a bride at betrothal, and between betrothal and marriage and at marriage, and the increment thereof, belong to the husband and wife jointly during their lives, and on the death of either pass absolutely to the survivor. The same custom appears to prevail with regard to special and costly clothes (*i.e.*, clothes intended to be worn only on special occasions and ceremonies) presented during the same periods.³

"Second marriage."

Amongst a certain class of Hindus, after the marriage of a girl and on the first appearance of her menses, a religious ceremony is performed which, in ordinary parlance, is called "second marriage," but otherwise known as *garvadhan*. After this ceremony actual consummation of the marriage takes place, as usually Hindu girls are married before they attain puberty. This "second marriage" before co-habitation is not required by the general Hindu law. In Assam this ceremony is known as *santibiah* or *panchibiah*. It is said there that if a girl cohabits with her husband without this ceremony, she is defiled and both she and her husband are outcasted. There was a case from Goalpara in Assam, in which the husband sued to have it declared that

¹ *Mulji Thakersey v. Gomti* 11 Bom. 412 (1887).

² *Nawrozjee Khoorsedjee v. Dhuna Baee* 1 Borr. 423 (1811).

³ *Byramji Bhimjibhai v. Jamsetji Nowroji* 16 Bom. 630 (1892). *Vide also Burjorjee Sorabjee v.*

Pestonjee Horneijer, suit No. 600 of 1876, decided on the 20th

September 1877; *Merwanjee Burjorjee v. Rustomjee Nanabhoy*,

suit No. 259 of 1883, decided on the 4th September 1884.

the defendant was his wife and was bound to live with him. But the defendant alleged that in order to constitute such a right, the custom required that there should have been a second marriage. As no such second marriage had taken place the suit was dismissed by the Deputy Commissioner. The High Court, however, (though it agreed with the Deputy Commissioner's decision) remanded the case, as no issue was framed on this question of custom in the lower Court.¹

Bashee Bibaha is a ceremony observed among some classes of Hindus which takes place on the day following the night of the celebration of marriage. In a case coming from Dinajpur, the question raised before the High Court in an application for review was whether a certain ceremony described as *bashee bibaha* was to be taken as part of the marriage ceremony, during the continuance of which gifts to the bride come under the denomination of "*Yantuka*." It was contended that if *bashee bibaha* was included in the marriage ceremonies, then gifts made to the bride on that occasion would be included in the *Yantuka*. If *bashee bibaha* was distinct from marriage proper, then the presents given to the bride on that occasion, must be excluded from the *Yantuka*. The High Court remanded the case as they thought the point could not be satisfactorily determined without an inquiry into the custom of the district in the caste to which the parties belonged, and observed: "If the *bashee bibaha* be found to be customarily as a material portion of the marriage ceremonies, so that gifts made at this particular time are by custom treated as part of the gifts before the nuptial fire, the husband will succeed to the disputed property in the list."²

Though a husband is the legal guardian of his wife from the moment of his marriage with her, yet, according to custom, she is allowed to remain with her parents until

*Bashee Bi-
baha.*

Custom of a
child wife to
remain with
her parents.

¹ See *Boolchand Kalta v. Muost. dha Soondar Nath* 11 Sevestre 591 *Junkee* 24 W. R. 228 (1875). (1871); s. c. 26 W. R. 304,

² *Bistoo Pershad Burrall v. Ra-*

she attains maturity. A Court has been held justified, while such a contingency had not happened, in refusing to direct her to go to her husband.¹

Marriage
within pro-
hibited de-
grees.

In Madras a marriage between a Hindu and the daughter of his wife's sister is sanctioned by wide-spread usage. Though some Hindu *Shashtra* (*e. g.*, *Aswalayana*) has condemned such a marriage on the ground of incongruous relationship, the Madras High Court had no hesitation in holding the marriage valid, as being in perfect accord with the custom satisfactorily established by evidence.² A marriage with an adoptive brother's daughter is held not to be sanctioned by usage of sufficient antiquity.³

Divorce or
Dissolution of
marriage.

Divorce is not contemplated by the Hindu law, but it is not repugnant to the principles, and if there be a well-established custom in its support it may over-ride the general provisions of that law.⁴ Sir William Strange in his treatise on Hindu law⁵ says that in the lowest classes a divorce is attainable between a husband and wife provided it is allowed by the custom of the caste. In a case which came from Gauhati in Assam, the wife stated that as her husband could not provide her with food and clothing and as she sustained cruel treatment in his hands, she left him and went to her father's house. Thereupon her husband divorced her and executed an agreement to that effect, on receipt of a portion of the money which he (the husband) gave her father at the time of her marriage. The Munsiff found that there was a custom in the Province of Assam for "men and women to assent to divorce by deed in this way." But as the District

¹ *Santosh Ram Dass v. Gera Pattuck* 23 W. R. 22 (1875); *Arumuga Mudali v. Viraraghara Mudali* 24 Mad. 255 (1900). But see *Kateeram Dokance v. Musst. Gendhenee* 23 W. R. 178 (1875).

² *Raghvendra Rau v. Jayaram*

Rau 20 Mad. 283 (1897).

³ *Vythilinga Muppanar v. Vijayathammal* 6 Mad. 43 (1882).

⁴ *Musst. Kudomee Dassee v. Jotiram Kolita* 1 Shome 65 (1877); *s. c.* 3 Cal. 305.

⁵ 4th Edn., Vol. I, p. 52.

Judge held that even if the custom were established it would not affect the Hindu law, and as he was wrong in holding such view, the High Court remanded the case to him for his finding on the custom which the Munsiff said was established.¹

Among the lower classes of people—whether in Bengal, Bombay, United Provinces of Agra and Oudh or in Southern India—divorce is allowed by caste-people. The grounds of divorce are generally habitual ill-treatment, impotency, or the dissolute and depraved habits of the husband. And the divorce is usually effected by mutual consent, on the payment of some compensation for marriage expenses incurred at the first marriage, or the return of *palu* and by a release or *chhar chitti*.² The Madras High Court in a recent case has held that there is nothing immoral in the caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage.³

The Punchayet or head of a caste could determine marriage and grant divorce.⁴ But in some cases the Courts have declined to recognize the authority of the Punchayet in granting a divorce.⁵ In an Allahabad case it has been laid down that while the Courts have generally accepted the decisions of properly constituted punchayets on questions of caste, they have accepted them subject to the qualifications that the decision of the Punchayet does not estop the Courts from enquiring into the civil rights

¹ 3 Cal 305.

² Vide among Kunsara caste in Surat : *Kaseram Kriparam v. Umbaram Hurreechand* 1 Borr. 429 (1811) ; among Walun caste : *Kasee Dhoolubh v. Ruttonbaee* 1 Borr. 452 (1817) ; *Hurha Shunkur v. Bacejee Munohur* 1 Borr. 391 (1809) ; *Soobra Tevan v. Moothoo-koody* 6 Mad. H. C. R. 40 (1870). *Sankaralingam Chetti v. Subban*

Chetti 17 Mad. 479 (1894). Parties are of the Potters caste in Tinnevelly.

³ *Sankaralingam Chetti v. Subban Chetti* 17 Mad. 479 (1894). See Caste Customs *supra*.

⁴ *Kalee Churn Shaw v. Dukhy Bebee* 5 C. L. R. 505 (1879) : s. c. 5 Cal. 692.

⁵ *Sambu Raghu* 1 Bom. 347 (1876).

of any member of the caste, and securing to him the enjoyment of such rights if he be found not to be precluded from the enjoyment of them by the *Shastras* or the particular usages of his caste.¹

Divorce in Assam.

It is very common in Assam for a husband and wife to agree to a divorce by a duly executed deed, stating that they had mutually consented to dissolve the contract, and in such a case the wife has been deemed free to marry again. When no written deed of divorce was executed the ceremony of tearing a betel leaf in two by the parties was considered sufficient for all purposes. Besides, according to local usage, any violation of the condition of the marriage contract deed will operate as a nullity of the marriage contracted before.

A married woman sought divorce on the strength of a bond executed by her husband before marriage, by which he engaged to consider his marriage void if he ever left the village in which his "wife and her friends reside or in case of cruelty, or in event of his ever marrying another wife." The High Court held that such contract, being opposed to public policy, would not render the marriage void.²

Whether loss of caste dissolves marriage.

It is a general principle of Hindu law that the degradation of the husband from caste does not dissolve the marriage tie. Unless a caste custom to the contrary is established no court should countenance such a dissolution. It is well-known that there is a distinction between ex-communications for different caste offences. In some cases the out-caste can never be restored to the privileges of his caste, but in the majority of instances he can procure absolution and restoration to caste by undergoing expiation or paying some penalty. It would be extremely inconvenient therefore to hold that by a deprivation of caste, which may be temporary, a member of the caste

¹ *Bisheshur v. Mata Gholam 2 v. Musst Aharee Heerahnee 11 N. W. P. (All.) 300 (1870).*

² *Sitaram alias Keera Heerah B. L. R. 129 p. 130 (1873).*

loses his marital rights, so as to confer on his wife the power of forming a second marriage; for if the husband were restored to caste, he could not be restored to the enjoyment of his marital rights if his wife had availed herself of her liberty to re-marry. In the case of such temporary degradation of her husband the utmost the wife could claim would be that she be relieved from consorting with him as long as he remained out of caste. But she must remain under his protection and must not leave his house.

In *Bisheshur v. Mata Gholam*¹ the parties belonged to the Ugvaru Banyah caste. The plaintiff sought an order from the Court to direct his wife to come to his house from the house of her parents, alleging that his wife had contracted a *sagai* marriage with the defendant. The defence was that the plaintiff had become an out-caste and, therefore, *civiliter mortuus*, and that by reason thereof, and in accordance with the custom of her caste, his wife was at liberty to marry. It appeared that owing to some dissensions, the members of the caste resident in the place separated themselves, as it were, into two sects; and by reason of the plaintiff consorting with a member of one sect he had been declared out of caste by a Punchayet composed of members of the other sect who were numerically in the majority. The High Court framing the following issue remanded the case to the lower court, viz., whether, if a husband is put out of caste for the cause for which the plaintiff had been declared to be out of caste the marriage was by the custom of the Ugvaru Banyah caste dissolved and the wife at liberty to contract a second marriage. The lower court returned a finding to the effect that the plaintiff was excommunicated for eating with one who was not of his caste; being turned out of caste on this account he could not be re-admitted; that his marriage was dis-

¹ 2 N. W. P. 300 (1870).

solved and that his wife was, with the sanction of the Panchayet, at liberty to contract a second marriage. Whereupon the High Court passed the following order :—“No objection having been taken to the findings on the issues remitted for trial, we must accept them, but at the same time we may express our doubts whether the finding is correct. The result of the finding is that the husband cannot insist upon the return of his wife to co-habitation, and the suit must be dismissed.”

The above order distinctly shows that the High Court had to pass it with great reluctance, the plaintiff having taken no objection to the findings of the lower Court before their Lordships. It does not establish the alleged caste custom, for their Lordships doubted the correctness of the findings of the lower court. Now, even if such a custom were established by clear evidence we think the Court would hesitate to give countenance to it. A sentence of excommunication, such as was passed in this case, should not have deprived a member of the caste of those civil rights which were claimed in this case.

In *Musst. Emurtee v. Nermul*¹ the Sudder Court laid down that loss of caste by a Hindu husband could not dissolve his marriage or justify his wife in forming a second marriage or bar his claim to the possession of her person; that to bar such a claim caste usages could not be pleaded, unless shown to be recognized by the *shastras*.

Authority of
Caste to de-
clare a mar-
riage void.

A Court will not recognize the authority of a caste to declare a marriage void or to give permission to a woman to re-marry. *Bona fide* belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge under section 494 I. P. C., marrying again during the life-time of the first husband, or to a charge of abetment of that offence under that section combined with section 109. I. P. C., though the

circumstance may be taken into account in mitigation of punishment.¹

There is a custom amongst the Jats of Ajmere that a man on marrying a widow must reimburse her late husband's relations for the expenses of her first marriage, and the custom is so well-known that no such marriage can be celebrated until these expenses have been paid. The custom, in fact, is so notorious that it may be said to have become part of the marriage contract in cases in which members of the community elect to marry widows.² A similar custom of paying *parisam* or original marriage expenses, prevails among the potter's caste in Tinnevelly.³

Custom of
recouping ori-
ginal expense
or *parisam*.

Under the Mahomedan law although there may be evidence of actual fact of marriage, yet where a lady co-habits with a person for a number of years and has a child by him, factum of marriage will be presumed, if there be an acknowledgment, either expressed or implied, by the father that the child is his lawful son.⁴ Under the Hindu law a Hindu widow on her re-marriage is disentitled to inherit. But if she becomes a Mahomedan before her marriage and then marries a Mahomedan her conversion does not involve forfeiture of inheritance.⁵ If a Hindu married woman becomes a convert to Moslemism and marries a Mahomedan while her Hindu husband is alive, her first marriage is not dissolved by her conversion. And as under the Mahomedan law a plurality of husbands is not permissible, her subsequent marriage is void. She is liable under section 494 I. P. C.⁶ Where a Hindu woman during the life-time of her Hindu husband became a Mahomedan and contracted a *nika* marriage with a Mahomedan, she was held to be in the position of an

Mahomedan
marriage.

¹ *Sambhu Rughu* 1 Bom. 347 (1876).

⁴ *Mahatala Bibee v. Prince Ahmed Haleemoozaman* 4 Shome 241 (1881).

² *Maddu v. Sheo Bakhsh*, 3 All. 385 (1881).

⁵ *Gopal Singh v. Dhungazee* 3 W. R. 206 (1865).

³ *Sankaralingam Chetty v. Sub- bun Chetty*, 17, Mad. 479 (1891).

⁶ *Rajkumari* 18 Cal. 261 (1891).

unchaste daughter and therefore disqualified to inherit her father's estate.¹

Christian
marriage

In *Lopez v Lopez* a Full Bench has held that among Roman Catholics the marriage of deceased wife's sister is not within the prohibited degree.² In *Skinner v. Skinner*³ the parties were adherents of the Mahomedan faith. In order to validate the marriage which they contemplated they had previously become Christians. But some time after marriage, they both reverted to their original creed and went through the form of marriage a second time according to Mahomedan law, and both continued in the practice and profession of the Mahomedan faith until the death of Mr. Skinner. About two years after their *nika* marriage the spouses separated. Mrs. Skinner went to live with her mother. Subsequently she cohabited with her alleged paramour by whom she had several children. Before separation she bore to Mr. Skinner a son and a daughter, whose legitimacy is not impeached. Both the children survived their father. Mr. Skinner after separation from his wife began to cohabit with another woman (Sophia Skinner), whom he treated as his wife and with whom he continued to live on that footing until his death. He was survived by his six children, born of that intercourse, who preferred an appeal to the Privy Council. As the hearing of the appeal was *ex parte*, their Lordships did not think it expedient to express any opinion as to the effect of a change of religion by the spouses, their domicile remaining the same, upon the rights of one or other of them which are incidental to marriage.⁴ Where a person who belonged to the Greek church subsequently embraced the Roman Catholic religion and married his deceased wife's sister (necessary dispensation having been granted to him) and thereafter speedily reverted to his original

¹ *Sundari Letani v. Petambari Lucas v. Lucas* 9 C. W. N. 323
Letani 9 C. W. N. 1003 (1905). (1901).

² 12 Cal. 706 (F. B.) [1885] See ³ 2 C. W. N. 209 (P. C.) [1897].

faith, it was held that this subsequent apostacy did not affect the validity of the marriage. It is not the province of the Courts to examine the sincerity of a man's religious convictions.¹

A marriage performed in accordance with the rites of the Brahmo Somaj is invalidated by the fact that either of the parties thereto has a husband or wife by a previous marriage alive.²

Brahmo
marriage.

In *Sinammal v. The Administrator General*,³ both husband and wife were Brahmans. The husband subsequently became a convert to Christianity. On his death his Brahman wife claimed his estate. The Court held that, according to Hindu law, the husband died an outcaste, and degraded, and that as his degradation was unatoned the marriage became absolutely dissolved and no right of inheritance remained to the wife.

Change of
of religion.
Escheat.

Among Gosains of the Deccan, and certain other places, marriage does not work forfeiture of the office of Mohunt and the rights and property attendant to it. The burden of proving that marriage works forfeiture lies on the person who impugns another's right on account of his marriage.⁴

Marriage of
Gosains ;
forfeiture.

Illegitimacy under Hindu law is no absolute disqualification for marriage, and when one or both contracting parties to a marriage are illegitimate, the marriage must be regarded as valid, if they are recognized by their caste people as belonging to the same caste.⁵

Marriage of
bastard.

¹ *Lucas v. Lucas*, 9 C.W. N. 323 (*1904*) : s.c. 32 Cal. 187. *Haribhakti*, 5 Bom. 682 (1880).

² *Sonalurmi v. Vishnuprasad Hariprasad*, 28 Bom. 597 O. C. (*1903*). *Rajkumari*, 18 Cal. 264 (1891); *Inderun Valangypoolg Tarer v. Ramaswamy Pandia Talerer*, 13 Moo. I. A. 141 (1869) : s. c. 3 B. L. R. 1 : s. c. 12 W. R. 41 affirming

³ 8 Mad. 169 (1883). *Panduuya Telarer v. Pule Telarer*. 1 Mad. H. C. R. 478 (1863).

CHAPTER IX. BUDDHIST CUSTOMS.

MARRIAGE.

The institution of marriage is one of the dearest and most cherished institutions in every civilized or semi-civilized country. It is the foundation of the family, and, as such, the foundation of society; for society is after all nothing more than an association of individuals. Unlike the Hindus, marriage is not regarded as a sacrament by the Buddhists, yet among no other class of people does marriage play such an important part as among the Burmans, in determining the devolution of property, both real and personal. Amongst the Hindus succession is regulated on the basis of spiritual benefit and religious efficacy. Amongst the Burmans it may be said that the same is governed on the basis of marriage. Buddhist law favours the equality of the sexes and in many ways treats marriage as creating a partnership in goods. Marriage being the most important part of Buddhist law, it is necessary to take the greatest care so that the mutual rights of husband and wife are not curtailed in any respect without a clear and satisfactory proof that such curtailment is authorized by law, or by custom having the force of law.

Three kinds
of marriage.

There are three kinds of marriage among the Burmese: (1) with the consent of parents on both sides; (2) through the negotiation of a third party; (3) by mutual consent only.¹ At the beginning of the twelfth chapter of *Menu Gye* it is thus laid down:—"Amongst men there are only three ways of becoming man and wife, which are as follows:—First; a man and woman given in marriage by their parents who live and eat together. Second, a man and

¹ Vide *Menu Kyay Dhamma-* p. 336, Richardson's Translation *thatas* Book V. s. 24 and Book XII., 2nd Edn.

woman brought by the intervention of a go-between, who live and eat together; *Third*, a man and woman who come together by mutual consent, who live and eat together."¹

To constitute a valid marriage no ceremony is requisite. All that is necessary is consent on both sides to live together as husband and wife. If the bride's parents are alive, it is usual for them to give their consent to the marriage, and it is also usual to inform relatives and friends and to have some sort of entertainment. But this is not necessary in order to make the marriage binding.² Mr. Jardine says: "After such consideration as I have been able to give to the subject, I am inclined to think that consent of both parties is essential to the contract of marriage and that no ceremony is essential either by the *Dhammathat* or by established custom, but that the public banquet or the joining of hands may be some evidence of consent, although that sort of evidence may be overruled by proof that there was no consent or acquiescence, e.g., by showing that immediately afterwards the girl repudiated by quitting the man."³ A man cannot contract a valid marriage with a minor girl without her guardian's consent.⁴ Living and eating together is not an essential of marriage but merely a formal proof of the validity of a marriage.⁵ It is worth mentioning that in section 24, Book V of the *Menu Kyay Dhammathat* in which three forms of marriage are laid down, all mention of living and eating together is excluded. It is only in the XIIth Volume p. 336 that the addition of these words is found.

A marriage between a man and a girl under the age of twenty years, without the consent of her parents is

What constitutes a valid marriage.

¹ Chan-Toon p. 383.

1891, Circular No. 11 Civil 1893

U.B.

A minor's marriage.

² *Mah E. v. Moung San Da*, 3 Bur L. R 8, (1897). See Jardine's *Notes on Buddhist Law* I, ss. 15, 22 and 23.

⁴ *Q. E. V. Nga Ne U Cr. Ref.* No. 6, Novem. 2, 1883.

³ Quoted in *Ma Gywe v. Ma Thi Da*, civil appeal No. 30 of

⁵ *Ma Gywe v. Ma Thi Da* Circular No. 11 Civil 1893, U.B.

null and void, and the parents can recover her person from the seducer. But if the parents know where their daughter is, and they fail to reclaim her within a reasonable time, i.e., until a sufficient time has elapsed to allow of a child being born by her, they shall have no power to cause her separation from her husband and the marriage shall stand good.¹

A Buddhist woman, if she is a minor at the time of her marriage and is duly given in wedlock by her parents, upon marriage is emancipated from parental control and ceases to be a minor so far as matrimony and its incidents are concerned. The Majority Act makes a special exception. Section 87 of the Civil Justice Regulation provides that any question respecting marriage is to be decided in accordance with the Buddhist law when the parties are Buddhists. Section 11 of the Contract Act has no application to the marriage contract among the Buddhists. Such a contract is something more than a contract or at any rate is subject to special conditions.² Lord Robertson observes : "The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts, in this, that the rights, obligations, or duties, arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matter of municipal regulation over which the parties have no control by any declaration of their will. * * * * Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should for ever be rendered incapable, as in the case of incurable insanity,

¹ *Metta Kyay Dhammathat*, Book VI, ss. 21, 22.

² See Story's *Conflict of Laws*, Chap. V.

or the like, from performing his part of the mutual contract."¹

In *Maung Myat Tha v. Ma Thou*,² which was a suit for restoration of conjugal rights against a Buddhist girl under the age of 18, the following observations occur:—“According to Buddhist law—Manugye Dhammathat VI, 30—‘a young woman who has never had a husband has no right to take one without the consent of her parents or guardians, but if she be a widow, or divorced from her husband, and she marry the man of her choice, her parents, guardians, or relatives have no right to interfere to prevent it; let the woman who has already had a husband take the man of her choice.’ No limit of age is here mentioned as in section 28, where it is 20 years. It appears, therefore, that a Buddhist woman in Burma is emancipated from parental control by marriage and ceases to be a minor, if she is one at the time of her marriage, so far as marriage is concerned.”

If a girl elopes with a man, the latter is bound to restore her to her parents three times. If after this she elopes with him again he has a right to keep her and marry her, and her parents cannot cause their separation: because they have proved themselves unable to keep their child under control.³

The father has the first right to dispose of his daughter in marriage; after his death the mother; after her death the brothers and sisters of the girl, according to age; failing all these, her guardian, i.e., the relation or other person under whose care and protection she is living.⁴ If the parents or guardian do not find a husband for the girl when she attains the age of twenty, she has a right to marry any one she pleases.¹² A widow or a divorced woman has a right to marry any one she pleases. Her

Elopement
and marriage.

Who can dis-
pose of a
girl.

¹ Quoted in Story's *Conflict of Laws*, pp. 185, 186. See p. 122, Chan-Toon's *Leading Cases*, cited there.

² *Menu Kyay Dhammathat* Book VI. s. 23.

³ Cir. No. 84, Civil, 1893, U.B.

⁴ *Menu Kyay Dhammathat* Book VI s. 28.

⁵ Ibid.

parents and relations cannot prevent it on the ground of her not being of age.¹ Parents, however, cannot compel their daughter to marry any one against her will.

**Presumption
of marriage.**

With regard to the general presumption of marriage arising from cohabitation with habit and repute, the Privy Council in a very recent case² has observed thus : "It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again the habit and repute, which alone is effective, is habit and repute of that particular status, which in the country in question, is lawful marriage. The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But, in countries where customs are different it is necessary to be more discriminating, more specially owing to the laxity with which the word "wife" is used by witnesses in regard to connection not reprobated by opinion, but not constituting marriage." A presumption of marriage cannot arise where there is no tangible evidence of recognition of a woman in her quality of wife by people external to the house in which she lives, and where substantially the only evidence is the use of the word "wife" in reference to her, in accordance with a local custom of applying it to persons whose status is not matrimonial.

**Prohibited
degrees.**

A man cannot marry within prohibited degrees of consanguinity and affinity. The prohibited degrees are almost the same as under the Hindu law. A Burmese can marry his wife's sister during the life-time of his wife.

¹ *Menn Kyay Dkammathat*
Book VI, s. 30.

² *Ma Wun Di v. Ma Kin*, 35
I. A. 41 p. 45 (1907).

He can also legally marry a brother's widow. Alliances on the part of the King and Princes of the Blood with their female relatives, within degrees of consanguinity much nearer than are allowed the people in general, are sanctioned by custom in Burma as well as in many other countries.

Mr. Jardine in his Notes on Buddhist Law¹ says: "I imagine that an issue as to whether any particular alliance was lawful, voidable or void from the beginning would have to be determined on evidence about existing custom as shewn in particular instances known to the witnesses and not on mere expression of unlearned opinion. * * * Where a particular connection is only voidable, not void, it would be held to be marriage until set aside as in the case of marriage with a deceased wife's sister contracted by East Indians domiciled in India, to whom certain Statutes expressly rendering such marriages void do not, in Mr. Mayne's opinion, apply. Such a marriage, he says, is good until set aside, and cannot be questioned after the death of either of the parties."

Polygamy is said to be lawful by Buddhist law.² But Polygamy. it may be doubted whether this conveys a correct impression unless it is understood in a limited or special sense. The leading principle of Buddhism in this respect seems to be rather monogamy than polygamy.³ This matter has been discussed in other cases though never definitely determined.⁴ When a plurality of wives is spoken of and at the same time four or five classes are mentioned, such, in some Dhammadhatas, as *Pona* or Brahmans, *Khattiyas* or, *Kshatryas*, &c., it is more with reference to Hindu law and usage than that of Buddhists.⁵

¹ Notes I. p. 8, cited in Lütter p. 13.

Ma Han, Cir. No. 36 of 1894; *Maung Kyaik v. Ma Gyi*, Civil Appeal No. 152 February 3, 1896.

² See Jardine's Notes I, 26, 35. ³ Vide *Ma Shwe Ma v. Ma Hlaing*, Cir. No. 107, civil, 1893, U. B. See Chantoon p. 355.

⁴ S. 48; Chap. III and s. 37 Chap. X, *Manugye*; ss. 2, 3, 4 and 33 of the *Wunnana*; s. 34 of the *Moharicchedani*, and s. 22 of the *Dhammavilasa*.

⁵ *Maung Ma v. Ma Cho*, Cir. No. 35 of 1894; *Maung Kank v.*

"Lesser wife"
and concubine

Sections 46 & 47, Chapter III and sections 40, 42 & 43, Chapter X of the *Manugye* make mention of the head wife, the "lesser wife," and the six kinds of concubines ; the 'lesser wife' being mentioned only in Chapter III, and concubines being spoken of in Chapter X. The expression "lesser wife" or *maya nge* seems to be ambiguous, as meaning a second wife taken either before or after the death of first wife.¹

As we have already said the principle of Buddhist law is that a man should have but one wife. She is called the head or chief wife. The expression "*maya*" or wife is applied to her. But as in practice the theory of monogamy is more honoured in the breach than in the observance, a relaxation of the theory is allowed and a state of concubinage or living with lesser wives is recognized among the Buddhists and accordingly provision is made for these lesser wives and their offspring sharing in the father's estate.

Generally the chief wife lives in the same house with her husband and eats together with her husband out of the same plate, and takes part in the management of her husband's business. Whereas a "lesser wife," or concubine, generally resides in a separate house and does not eat with the head of the family and does not take part in the management of her husband's business. But the mere fact of a separate establishment existing does not prevent a woman from being a wife. It simply affords a presumption which can certainly be rebutted by evidence showing a higher status.²

Sections 37 & 38, Chapter X of the *Manugye* and sections 46, 47 & 48 Chapter III and sections 2 & 5 of the *Wunnana*, refer to the different classes of wives and the effect of their living in separate houses, and to the different degrees of responsibility of the husband for the debts contracted by a head wife, a "lesser wife" and a concubine respectively. The

¹ See *Manugye* X 6.

Shwe Ma Cir. No. 18 Civil 1894,

² *Ma Hmon v. Maung Paw*
Dan, Second Appeal No. 89, May
17, 1899 ; *Ma Hlaing v. Ma*

U. B. ; *Ma Gyee v. Ma Thi Da*
Cir. 11 Civil 1893, U. B.

Manugye gives to the concubine a somewhat larger share than that of the "lesser wife," but the difference is very trifling. It is considered by some that this distinction was unintentional and perhaps accidental.

In *Maung Kyaik v. Ma Gyi*,¹ the question at issue was whether a man who, while professing the Christian religion, had contracted a marriage in accordance with the law applicable to the marriage of Christians could, by professing another religion, contract a second valid marriage in accordance with the law applicable to the marriage of persons belonging to that religion during the life-time of the first wife. Here the plaintiff was a Burman Buddhist converted to Christianity. He married a similar convert according to the rites of the Roman Catholic Church, subsequently both husband and wife reverted to Buddhism and the husband (the plaintiff) took a second wife according to Burman custom. The second wife subsequently refused to live with the plaintiff on the ground that there was no valid marriage between them. Thereupon the latter brought a suit for restitution of conjugal rights. The whole question rested on the point whether the former marriage subsisted or not. If that had ceased or come to an end there would be no obstacle in the way of the subsequent union according to any religious form. But as in this case it was found that the former wife was still living and there had been no divorce or judicial dissolution of marriage, the first marriage continued in force. And as there was no authority to show that apostasy from the Christian religion has the effect of dissolving a marriage contracted according to that religion it was held that the original marriage having remained unaffected by any subsequent change of religion the Christian marriage law did not permit the plaintiff to enter into a second valid marriage in any form during the existence of the first, even with his first wife's consent; and further, that

Marriage of
Burmese
converts.

even under the Buddhist marriage law he, as a Buddhist, could not claim the liberty of having more wives than one, so long as he remained bound by a Christian marriage and his wife was alive.

Breach of promise of

If the parents of a girl, after betrothal, refuse to give her in marriage to the betrothed man, they must return to the bridegroom all the presents he made to them on betrothal. They are further liable to pay damages under orders of the Court.¹ Similarly if a betrothed man refuses to fulfil his engagement, he forfeits all the presents and is liable to pay damages. In the case of seduced girls a provision for damages has been made in the *Dhammathats*.² The question, viz., whether between Burmans an action for breach of promise of marriage will lie was finally determined in *Maung Hmaing v. Ma Pwa Me*.³ Therein it was held that action for damages for the breach of a contract would lie, and further, in the case of seduction, in assessing damages, the Court would take into consideration the injury done to the seduced girl's "future prospects of marriage, to her feelings and affections, and to her social position." Where there has been no promise to marry, a Burmese woman cannot recover damages for seduction resulting in pregnancy.⁴ Nor can she claim damages merely on the ground of pregnancy having resulted from cohabitation.⁵

Second marriage of a man.

In the absence of a special custom to the contrary a husband who, in the life-time of his first wife, marries a second wife without the first wife's consent does not thereby commit a fault against the first wife. Such a second marriage does not in itself constitute a ground of divorce in Lower Burma.⁶

¹ See *Menu Kyay Dhammathat Zan*, Civ. App. No. 74, December Book VI, s. 17. 22, 1883. Sel. Judgments. p. 235.

² See Book VI, 26-30.

³ Civil Ref. No. 4, June 4, 1893. Selected Judgments p. 533.

⁴ *Nga Po Thaik v. Mi Hnin*

⁵ *Mi Kin v. Nga Myin Gyi*. Civ. App. No. 100, Oct. 17, 1882. Sel. Judgments. p. 114.

⁶ *Ma In Than v. Maung Saw*

A widow or a woman who has been divorced may marry again as soon as she pleases. A woman, whose husband enters the priesthood, must wait seven days. At the expiration of that period, if the husband does not return to the world, she is at liberty to take another husband. And if the man who has become a *phoongyee* does not return to the world within seven days of his ordination he cannot claim back his wife whether she has married or not.¹ If the husband deserts his wife she must wait three years, even if she hears that he has taken another wife, and if she does not receive any present or letter from him. Although she hears that her husband has taken another wife, if she has received a letter or present from him she shall not marry again until three years from the date of receiving the last letter or present, for so long as a husband maintains communication with his wife he may take as many more wives as he pleases.² In *Moung Kho v. Mah May*,³ it was held, that three years' absence, with neglect on the part of her husband to provide maintenance, is required before the wife can contract a second marriage. If the widow re-marries, she is to take her half share of the joint property, and the children by the former marriage are to divide the other half.⁴

Re-marriage
of a woman.

DIVORCE.

Major Sparks, in dealing with the subject of Divorce, observed as follows:—"Marriage by the Burmese law is purely a civil contract terminable at any time by mutual consent, or, under certain circumstances, against the will

Hla, Civ. Ref. No. 1, July 20, 1881.
Sel. Judg. p 103. But see *Maung Kauk v. Ma Hon*, Cir. No. 36, Civil 1894, U.B.

Wunnana s. 122 last para and s.135 Chap. on Marriage. Jardine's Notes III, (translation).

² Civil Appeal March 4, 1874 Sandford's Rulings 15.

¹ See *Menu Kyay Dhammathat* Book V, s. 18; *Wunnana* s. 108, Chap. on Marriage. Jardine's Notes III (translation).

⁴ *Wunnana* s. 26 (Pereira's Collection of Dhammathats, p. 122); *Atta Sanhhepa Wunnana* s. 159,

³ *Menu Kyay* Book V. s. 16;

of one of the parties. A divorce may either be pronounced by a Court when one party does not consent, or it may be completed by a written agreement executed by both parties in the presence of respectable witnesses specially called together for the purpose." Mr. Jardine takes exception to the statement that marriage is a "purely civil contract" and contends that it is an institution with a moral and religious sanction. He observes:—"As to the contract being purely a civil contract I think it is necessary to quote, as applicable to Buddhist law and the present question, the words of the Judge Ordinary in *Hyde v. Hyde** applied with approval to Hindu marriages by Westroff C. J., in *Sidlingapa v. Sidavat* 'marriage has been well said to be something more than a contract, either religious or civil, to be an institution. It creates mutual rights and obligations as all contracts do, but beyond that it confers a status.' In *Ardasur Cursetjee v. Piroze Boye*,† their Lordships of the Privy Council observed that 'whatever the form of the contract may be, marriage constitutes, if not an express, at all events, an implied contract between the parties that the husband shall maintain the wife.' In the Buddhist texts we find elaborate provisions against abandonment and careful rules made for the maintenance of sick and diseased husbands and wives and for the maintenance of children if the parties divorce. Much of the law of inheritance is explained by moral duties; this basis appears to have been taken the place occupied by *Shradh* in the Hindu law. It is continually found in the texts on marriage; and besides this, we find that a marriage creates a partnership in property, income and liabilities; and, the division of assets and liabilities is discussed as one of the matters requiring settlement at a divorce as well the distribution of children."‡

* I. P. & D. 136.

† 2 Bom. 624.

‡ 6 Moo I. A. 348.

* *Nga Lon v. Ma Myainy*, Civil Appeal No. 75, November 26, 1883 ; S. J. p. 206.

But whether a marriage is a purely civil contract or not, the chief Court, after thoroughly and exhaustively considering various authorities on the point, has come to the conclusion that a marriage between Burmese Buddhists may be dissolved at any time by *mutual consent*, and that where such consent is wanting, it cannot be dissolved except on some ground recognized by the *Dhammathats* and *not* by the mere volition of one of the parties. This view has subsequently been affirmed by the Calcutta High Court to which the matter came on as a reference from the Recorder of Rangoon.¹

It should be noted that in divorce proceedings in Burma between Buddhists, the question between the parties is almost invariably as to their respective rights to property which they have hitherto enjoyed together; and this turns in a great measure on their conduct to one another. Therefore, willingness on the part of the parties concerned to have the tie between them severed does not necessarily mean that they are also willing that the severance should be treated as of the kind called "mutual consent," which gives each an equal share in joint property.²

Dr. Forchhammer in his paper, published in Mr. Jardine's Notes, expressed his opinion that the deeds which justify a Buddhist to sever his destiny from that of his or her partner are matricide, patricide, killing, stealing, shedding the blood of a Buddha or Rahan, heresy, and adultery. The Calcutta High Court in *Maung So Min v. Ma Ta*³ has held that besides those offences or faults the *Dhammathats* contemplate other causes from which a divorce may be obtained. A divorce cannot be had merely because one of the parties has no love for the other, or does

Grounds of
divorce.

¹ *Nga Nwe v. Mi Su Ma*. Cr. Ref. No. 2, July 8, 1886: S. J. p. 391. Affirmed by the Cal. H. C.

in *Maung So Min. v. Mak Tah*, April 27, 1892: S. J. p. 610.

² *Maung Kauk v. Ma Han*, Cir. No. 36, 1894, U.B. : Chan-Toon p. 99.

³ April 27, 1892 : S. J. 610 : 19 Cal. 469 (1892).

not comply with the desires of the other.¹ A mere willingness on the part of one party to pay *ko-bo*, or the price of the body; or to surrender the whole of the joint property will not constitute a ground for divorce when it is sought against the wish of one of the parties.² Before a Court can order a divorce at the wish of one party against that of the other, it must be satisfied on evidence that some fault has been committed by one against the other of a sufficiently serious nature to justify such order according to the *Dhammathats*, or that some evil deed has been committed for which a separation of destinies can take place.³

In a later case, however, it has been held that there is no insuperable legal bar to divorce against the party desiring it, where the party is prepared to surrender the share of the joint property to which he or she would, otherwise, be entitled. In this case the sole question was whether a husband, whatever his own conduct may have been, is entitled to obtain a decree for divorce against his faultless wife, on condition of surrendering to her the joint property and paying the joint debts. The Court, on a consideration of the various texts relating to the question, was of opinion that the texts in the *Dhammathats* establish the law that one of the parties to a marriage can separate from the other, even if the latter does not consent, provided that the properties belonging to both and their liabilities are divided.⁴ In the case of a slave wife both the payment of *ko-bo* and the assent of the husband are essential when a divorce takes place.⁵

Second marriage.

When a husband marries a second wife without the first wife's consent, and in her life-time, that second marriage does not in itself constitute in Lower Burma a ground

¹ *Maung So Min v. Ma Ta* 27 April, 1892 : S. J. 610

² *Mi Pa Du v. Maung Shwe Bank*, Civil Appeal No. 118, July 4, 1891 : S. J. 607.

³ *Ibid.*

⁴ *Mikin Lat v. Nga Ba So*, U. B. R. 1905.

⁵ *Ma Pa Du v. Maung Shwe Bank* Civil Appeal No. 118 July 4, 1891 : S. J. 607.

for divorce.¹ But in *Maung Kank v. Ma Hau*,² where a wife brought a suit for divorce on the grounds of cruelty³ by the husband in taking a second wife, and of the imputation of adultery to her, *i.e.*, the plaintiff's first wife, the Court held that whether the matters alleged by the plaintiff constituted cruelty or not in general, she had, in this instance, by her conduct, acquiesced in or condoned the conduct of her husband, and was not entitled to a decree. In this case the first wife, *i.e.*, the plaintiff, abandoned her husband for the time being and left him to his own devices, and the taking of a lesser wife might have been expected. And as regards the accusation of adultery, the plaintiff, it seems, submitted to it and promised her husband to be circumspect in her future conduct and she had condoned her husband's behaviour in the matter and was ready to return to him. The Court did not follow the ruling laid down in *Augustin v. Augustin*,⁴ viz., that even if a husband prefers a charge of adultery against his wife without reasonable and probable cause, and wilfully and maliciously, it will not amount to legal cruelty entitling the wife to a judicial separation. The Court doubted whether a similar rule ought to be applied where the parties are Buddhists. In the other case the parties were Christians. But in this case as the wife was the party who put herself in the wrong to begin with, the Court said it would be difficult to hold that this would be sufficient to establish cruelty.

As has already been noticed, three years' absence, with neglect on the part of the husband to provide the wife with the means of subsistence, is required to give the wife the right of re marriage. Until the expiration of that period the relation of marriage subsists unless, of

Desertion.

¹ *Ma In Than v. Maung Siv Hla*, Civil Ref. No. 1 July 20, 1881: Sel. Judgments, p. 103.

² Cir. No 36, 1894, U. B. Chan-
Toon p. 99.

³ As to what amounts to "cruelty" as a technical term in English and Buddhist law, see Chan-Toon p. 131.

⁴ 4 All 374.

course, it is put a stop to by some formal act of separation.¹ In *Maung Po Manng v. L. H. R. L. P. Nagalingum Chetty*² it was discussed whether a husband's abandonment of his wife completely for a period of three years puts an end, *ipso facto* and without any special action, to the matrimonial union; or, whether such separation merely confers a right to claim a divorce and does not of itself constitute a divorce without formal steps being taken to give effect to the claim. The learned Judicial Commissioner after referring to section 17, Chap. V., of the *Manugye Dhammathat* and section 291 of the *Altathankepa*, and some cases reported in Selected Judgments and Ruliugs,³ Lower Burma, said: "But the precise point which might arise here has not been definitely dealt with, though it seems to be implied that the union is naturally dissolved at the end of three years. The *Dhammathats* give liberty to take another wife or husband at the expiration of three years, and they make no provision for any communication with the former husband or wife, or for the taking of any formal proceedings for declaring a dissolution of the marriage bond. Apparently the severance of the conubial tie is deemed to be sufficiently manifested by open separation for such a length of time. The actual taking of another wife or husband would, of course, make the state of affairs clearer and more public, but it does not appear to be absolutely necessary that this, or anything else, should be done to render the separation a complete divorce."

In *Thein Pe v. U. Pet*⁴ the point referred to the Full Bench was whether the desertion of the husband by the wife or *vice versa*, for the period specified in the Buddhist Law Texts, has the effect of dissolving the marriage tie

¹ *Dhammathats* Book V. paras. 14-17; *Maung Ko v. Ma Me*, Civil Appeal, March 4, 1874, Sel. Judgments, p. 19.

² *Maung Ko v. Ma Me* p. 19; *Mi Nu v. Maung Saing* p. 28; and *Nya Nwe v. Mi Su Ma* p. 391.

³ 3 L. B. R. 175 (F. B.).

⁴ Cir. No. 53 Cri. 1894. U. B.

in the absence of any further and express act of volition on the part of either of them. It was held that even if the actual texts of the *Dhammathats* supported the proposition that marriage is dissolved by mere desertion, it must be remembered, in applying the personal law, that it is in course of time apt to change by the development of customs inconsistent with such law. Further, it is quite conceivable that a husband and a wife may quarrel and live apart, each on their own means, without the least desire to proceed to the extremity of a divorce, and the idea that marriage can be terminated at all, without the wish of one or the other of the parties to it, is contrary to, and inconsistent with, the fundamental principle of the marriage contract. Further, it was held (by the majority) that the decision should be based only on the correct interpretation of the texts, irrespective of how the Burmese community may regard the matter, and such texts have laid it down that, at the end of three years of continued desertion of a wife by a husband, or at the end of one year's continued desertion by a wife of her husband, the marriage of the husband and wife is dissolved without any further and express act of volition on the part of either party.

Where a wife leaves her husband's house for the mere reason that she no longer wishes to live with him, without any fault whatsoever on his part, and remains separate for a year unsupported by him, it was held, that she cannot claim a divorce, as no desertion of any kind by the husband is proved or asserted.¹ Whether the husband would in such a case be able to claim a divorce against a woman who left him for a year and whom he did not support, even though she resisted the divorce, is a matter which was left open in that case, though the learned Judicial Commissioner observed that "very probably he would, he being the deserted party." But this was merely *obiter dicta*.

¹ *Ma Thin v. Maung Kyaw Ya* Cir. No. 20 Civil 1896, U. B.

Kan-ma-sat.

A divorce cannot be granted merely on the ground that the destinies of the husband and wife are not cast together (*i.e., Kan-ma-sat*).¹

Validity of divorce.

In order to constitute a valid divorce between Burman Buddhists, neither a decree or order of Court, nor a written agreement executed by both parties in the presence of respectable witnesses is essential.² When one of the spouse is not in a condition to express dissent or consent in the matter, it cannot be said that a valid divorce has been made. So, where a husband, a short time before his death, sent to his wife, who was at that time out of her mind, a paper containing an intimation of divorce, the Court held that that did not constitute a valid divorce.³ In determining on the mutual consent which gives validity to a divorce the Court has a right to consider whether the consent was really free and deliberate.

Division of property on divorce.

Where husband and wife both assent to a divorce and no fault is proved, each is entitled to take back property brought at the marriage, and to an equal division of the property that may have been acquired conjointly during wedlock.⁴ A woman having a separate establishment from her husband and taking no share in the management of his business, and performing the duties of a wife no more than by receiving his visits, is not entitled to hold the property acquired by her husband, who carried on business in the house of his first wife, as joint property.⁵

Actual division of goods not essential.

Actual division of goods is not essential to the validity of divorce. The actual separation of goods is (as very often is the case) evidence of previous divorce and shows

¹ *Ibid.* See *Manukye XII*, 3 ; *Moung Tso Min v. Mah Htah* 19 Cal. 469 p. 476 (1892) ; *Mi Pa Du v. Maung Shwe Baik* S.J. 607. The word *kau-ma-sat* literally means, *kau* fate, *ma* not *sat* linked. See *Chan-Toon* p. 63.

² *Mi Huin Ngon v. Nga Aung* Civil Ref. No. 7, June 11, 1896,

Sel. Judgments, p. 73.

³ *Mi Chin Mari v. Mi Tu Ma*, Civil Appeal No. 20, Sep. 14, 1876. S. J. p. 74.

⁴ *Mi Dwe Naw v. Maung Tu*, Civil Appeal, Sep. 3, 1873. S. J. p. 14.

⁵ *Maung Kyin v. Ma Saung*, Civil Appeal, June 3, 1874, S. J. 27

deliberate intention to terminate the *status* of husband and wife. A divorcee may be proved by other evidence of intention showing that a termination of the marriage, and not a mere temporary separation, was deliberately intended. In *Nga Lon v. Ma Myaing*,¹ the plaintiff was a sister of the defendant's wife who committed suicide five days after her divorce from her husband (the defendant) by mutual consent; the divorce having been effected by a written document showing their deliberate intentions to divorce. There being no children of the marriage the plaintiff claimed the property of her deceased sister, alleging that her sister was in possession of her share after the divorce, but that the defendant had seized it wrongfully. The defendant answered admitting the divorce, but averring that the property had not been divided, and that he and his deceased wife became re united three days afterwards as husband and wife, and that he had, therefore, acted on the principle that the husband and wife inherit from each other. No re-union was proved in this case. The whole case then turned upon the point whether the divorce evidenced by the written agreement was valid, notwithstanding the fact that the joint property had not been divided. The Court found that the transaction, *viz.*, the written agreement to divorce, clearly showed that the parties intended to put an end to their marriage *status*. Further, there was clear evidence of a deliberate selection of particular goods by each as his or her share. Actual corporal partition was no more an essential than under the Hindu law of partition of an undivided family. The transaction might be treated as a valid divorce. Accordingly it was held that the sister of the deceased woman was entitled to the latter's property.

In *Ma Gyan v. Maung Su Wa*,² which was a suit by the wife for divorce without division of property, it was held that divorce without, and distinct from, division of property

¹ Civil Appeal No. 75 Novem. 26, 1883. S. J. p. 206. ² Civil Appeal No. 21 May 3, 1897.

was incompatible with Buddhist law and that, therefore, there was no cause of action, for when a divorce is sought through the intervention of a Court, the suit should be framed both for divorce and partition. Otherwise, a Court's decree for bare divorce would leave all the property to the party against whom the decree might be made. But in such a case the suit would be superfluous, as, under the Buddhist law, either party to the marriage is at liberty to withdraw from the union upon submission to the penalty of forfeiture of claims to the substantial assets of the conjugal association in favour of the party disinclined to the severance of the nuptial bonds. There would be no cause of action where there was no resistance to the exercise of this privilege and the assistance of the Court would not be required except in the form of a declaration. Where, of course, the party seeking divorce wants his or her legitimate share of the joint property, the proper form of the suit is both for divorce and partition of property together.

Disposal of property on divorce for adultery.

There are two rules of Buddhist law on the subject of a divorce for adultery; one relates to the case of husband and wife married from their youth, and the other, to the case of husband and wife where there has been a previous marriage by one or both, or at least by the wife. The reason for making such a distinction, in the words of Burgess J., is as follows: "When a woman has been married before, the probability is that she has formed relations through giving birth to children or through the acquisition of property, which ought to be considered when she has entered into a subsequent union which has to be dissolved. Although she may be in fault there are others besides herself to be considered, and it would be unjust and cruel to make them suffer for her misconduct. On the other hand, when the woman has been only once married there is nobody to be considered but herself and the children, and as the latter are the offspring of the husband, it is probably immaterial, so far as they are

concerned, to which parent the property goes, as they would eventually inherit from one or the other. The same, *mutatis mutandis*, would apply in the case of a husband whom the wife was entitled to divorce for misconduct."¹ In *Maung Yin Manng v. Ma So^a* the parties were unmarried before they became husband and wife, but they subsequently separated and then re-united. There seemed to be no precedent on the point. It was, however, decided on the principle, stated by Burgess J., as above, that as neither of the parties, though both were re-married, had married a stranger, but had only re-united with each other, they must be regarded as still the husband and wife of youth. Consequently the first rule applied to them.

In the judgment in Cir. No. 24 of 1893 it has been laid down that the adulterous wife forfeits every thing without reservation. This ruling was based on the texts in the *Attathankepa* which have been quoted and translated in that judgment. This is also supported by passages in sections 3 & 43, Chapter XII, of the *Manugye*. Reversing the judgment of the lower Appellate Court which upheld the decree of the Court of first instance holding that the right of the husband extended only to joint property and that the rule of Buddhist law was penal and not enforceable to the extent to which it was penal, the Rangoon Chief Court held that the rule applied without restriction and there was no obligation on the Courts to import a restriction in regard to salutary provision of the sort. The fact that there was a child of the marriage to be provided for did not properly come into consideration in the case at all. The first Court, in this case, granted a decree for divorce, but allowed the husband only a portion of the property claimed on the ground that the wife had the custody of a child of the marriage who was six years old, and that

¹ Vide *Maung Yin Manng v. Toon* p. 133.

Ma So Civil Appeal No. 141, 28 * Civil Appeal No. 141, Sept. 28,
September 1897. U. B.: Chan- 1897. U. B.

in order to enable her to bring up the child she ought to retain the portion disallowed. The husband claimed the whole of the property which belonged to his wife, and to his wife and himself together.

Forfeiture of property cannot follow a divorce decree by court.

A woman who has obtained a divorce by a decree of the Court cannot be made to relinquish all her property. The forfeiture of property appears to be a punishment for improper desertion, and cannot, therefore, follow a divorce decreed by the Court.¹

Strict proof required when re-union set up after divorce.

When a divorce has taken place between husband and wife and re-union is set up by the former wife, on the death of the former husband, in order to support a claim to his estate, strict proof is required of the renewal of connubial relations, just as clear proof of marriage in the first instance is required, when the question is whether the *status* of wife has been acquired at all.²

Collusive divorce to avoid attachment of property.

In an execution proceeding husband's lands were attached by the judgment-creditor and the wife sued to have the attachment removed on the ground that the lands were her separate ancestral property and that her husband and she were divorced. It was admitted that under section 3, Chapter XII, of the *Manugye*, upon divorce by mutual consent, both husband and wife being noble, each takes clothes and ornaments of his or her rank; and in the case of property acquired by the husband alone or by the wife alone, the party who separately acquired it gets two-thirds and the other one-third. But where the husband assigned all his property to his wife excepting his own personal belongings, though the separation was by mutual consent, and where the deed of divorce itself showed frivolous nature of the proceeding in assigning as the cause for the separation the failure of the union to result in any profit to the parties and where the divorce was effected on the very day the

¹ *Maung Po Lat v. Mi Po Le,* *Lu Gyi v. Ma Nyan*
Civil Appeal No. 71, Novem. 26, Cir No. 15, Civil 1895,
1883, S. J. p. 212.

execution was applied for, it was held that the arrangement was collusive for the purpose of defeating the judgment-creditor. The Court decreed that the husband's admitted share of one-third should remain under attachment.¹

In the absence of special circumstances, it is presumed that the affairs of the people divorcing and re-marrying are settled definitely at the divorce or re-marriage.²

In a suit for a divorce from a Mahomedan husband, brought by a Burmese woman professing the Buddhist faith, but at the time of her marriage, simulating conversion to Islam, and married with Mahomedan ceremonies, the Mahomedan rule should form the rule of decision; and that the Courts cannot grant a divorce in such a case when no fault is established on the husband's side.³

By a custom prevailing among Burmans *Jobya-nanbya* is a divorce given by either husband or wife to the other in order to secure that other's recovery from serious illness. In *Maung Bah Oh v. Maung San Bu*,⁴ the husband consulted an astrologer about his wife's illness on the day before she died, and was told by him that he must do certain things, among other things, give her a temporary divorce. Accordingly he gave his wife a document of divorce, telling her that it was only temporary. It was held that the divorce was a temporary one given, in the superstitious belief that it would be for the benefit of the wife's health. The High Court of Calcutta confirmed this case on appeal on the 1st March 1894.

Presumption on divorce as to settlement of affairs.

Suit for divorce by Burmese wife against Mahomedan husband.

Jobya-nanbya.

¹ *Maung Tha Dun Aung v. Ma Min Aung*, Cir. No. 58, Civil 1893. U. B. See *Ma Me v. Maung Gyi*, Cir. No. 117 Cri. 1893. U. B.

June 20, 1878 S. J. p. 175.

² *Kumal Sheriff v. Mi Shwe Ywet*, Civil Refce. No. 1, May 12, 1875. S. J. p. 49.

³ *Maung Shwe Lin v. Mi Nyein Byu*, Civil Appeal No. 28,

⁴ 1 Burma L. R. 14.

ADOPTION.

Two kinds of adoption prevail among the Burman Buddhists, viz., *Kittima* and *Ditika*. A *Kittima* is a child of known parents, adopted formally and publicly, with the consent of those parents, and with a promise that the adopted child shall inherit as a child of the adoptive parents. A *Ditika* is a foundling, whose parents and relatives are unknown, casually taken charge of, and adopted out of charity.¹ The *Dhammathat* speaks of "the sons and daughters of another person" as eligible for adoption. In this respect the Burman custom of adoption resembles that of the Tamils of Jaffna in Ceylon, who adopt boys as well as girls. The terms *kittima* and *ditika* are evidently mispronunciations of the words *kritima* and *duttaka* used by Hindu jurists. Mr. Jardine in speaking of *kittima* says it "bears an Indian name; but we know it to be in force as a custom here as much as among non-Aryan races or communities who attach no religious importance to it.... It is probable enough that the Burmans like the Dravidians of Southern India have been following, perhaps unconsciously, the rules of the Hindu rulers or colonists; and indeed I know of no other key to many things in their customs as well as their laws."²

¹ *Menu Kyay*, Book X, s. 81, and Book VIII, s. 4. See also the following :—"The sons & daughters of another person, who shall be publicly taken and brought up (in order or with the understanding) that they should be made children to inherit—they are called *kittima* i.e., notoriously adopted children."—*Dhammathat*, Book X, p. 305.

"Children obtained by request from their parents and adopted publicly."—*Ibid* p. 311.

The *Manugye Dhammathat* describes *kittima* children as those publicly adopted with the recog-

nized intention of making them heirs—p. 314 (3rd Edn.).

There is another class of children mentioned at pp. 314, 315 of *Manugye* under the head of the sixth class of children entitled to inherit. They are "children, male or female, who have no parents or whose parents or relations are not known, or whose parents or relations are known, who have been casually taken charge of and brought up."—*Apatitha* or *Appadita* son spoken of in the *Wunnana* s. 84. Mr. Jardine's Notes V. 29.

² Vide *Ma Le v. Ma Pauk Pin*,

No ceremony or written document is required to constitute a public adoption. There must be a request from parents and a notorious and public taking and bringing up in order that, or with the understanding that, the child shall inherit.¹ As to the requirement of request, where the parents of the child to be adopted are dead, it cannot be complied with. In this connection it may be noted that such request is mentioned at p. 319 of the *Manugye Dhammathat*, but it is not referred to at p. 314 which only speaks of the "children of others."² Though young children are no doubt primarily intended, there seems to be no limit as to age. Instances of the adoption of elderly persons are not rare.³

As openly living together is presumptive proof of marriage among Burmans, so the bringing up of a child with publicity and supporting him or her for a number of years is presumptive proof of adoption, especially where the parents are childless and the child is a nephew or a niece.⁴

The duties of an adopted child are similar to those of a natural child. Separate living may constitute a disqualification to inheritance by the adopted child, but the question as to what constitutes separate living depends upon the circumstances of each particular case.⁵ An adopted child, by marrying and living separately from the adoptive parents does not by the mere fact of marriage forfeit the rights of inheritance in his or her adoptive family. But the burden of proving that he has performed

Duties of an adopted child.

Decem. 12, 1883 : S. J. p. 225 : Toon 161.

Chan-Toon p. 255.

¹ *Ma Gun v. Ma Gun*, Civil Appeal, May 29, 1874, 1 Lower Burma 25; *Ma Me Gale v. Ma Sa Yi*, 32 I. A. 72 (1904) : S.C. 32 Cal. 219.

² Vide *Manugye Dhammathat*.

³ *Maung Aing v. Ma Kin*, Cir. No. 35 Civil 1898. U. B. : Chan-

⁴ *Ma Gun v. Ma Gun*, Civil Appeal, May 29, 1874 : S. J. 25; *Maung Aing v. Ma Kin*, Cir. No. 35, Civil 1893: *Ma Gyan v. Maung Kywin*, Cir. No. 77, Civil 1895. U. B.

⁵ *Maung Aing v. Ma Kin*, Cir. No. 35, Civil 1893.

the duties necessary to be performed by an adopted child will be thrown upon him, and, in the absence of such proof, the Courts will disallow his claim to inherit. Mere occasional assistance on the part of the adopted child is not sufficient to preserve his or her right of inheritance.¹

A Buddhist can adopt a child, he having a child of his own *at the time*. As far as the *Dhammathat* goes, it shows that there is no objection, as there is amongst Hindus, to persons adopting a child whilst they have one of their own living.²

The publicly adopted child stands in the same position as regards inheritance as the natural child.³ Under section 27, Chapter X., of the *Manugye Dhammathat* a *kittima* adopted son takes the position of a natural son when there are no natural children.⁴

Publicity and
notoriety es-
sential to es-
tablish *kit-
tima*.

An essential part of adoption is the publicity of the relationship and of the intentions of the adoptive parents with regard to the inheritance to their estate by the adoptive child. The *Manugye Dhammathat* requires that the child should be brought up "*akyaw asaw thuthi thutin*." The English equivalents given in the translation (Chapter X, section 26) are "publicly state his intention of adopting the child of another person, and shall take and support the child openly".... "being a notoriously adopted child." The reason why the child gets a share of the inheritance is that a child so publicly and notoriously adopted shall not return and share in the inheritance left by his or her own parents.⁵

¹ *Nga Min Gyaw v. Me Pi*, Civil Appeal, May 28, 1873. S.J. p. 8. See also *Maung Po Sein v. Maung In Dun*, Civil Appeal No. 44, Sep. 8, 1883. S.J. p. 191 L.B.

² *Ma Buin v. Ma Yin*, Civil Appeal No. 6, Novem. 27, 1879. S.J. p. 100.

³ *Ma Gun v. Ma Gun* Civil Appeal, September 18, 1874 : S.J. p. 23.

⁴ *Maung Sa So v. Mi Han*. Cir. No. 68, Civil, 1893. U.B

⁵ *Ma Mein Gale v. Ma Kin*. Cir. No. 61, Civil, 1893 U. B Chan-Toon p. 162.

Let us consider if wilful separation from adoptive parents constitutes an undutiful conduct on the part of an adopted child. *Nga Min Gyaw v. Me Pi*¹ is the earliest case on the point. It laid down that an adopted child who, on marriage, separated himself from his adoptive parents should be presumed to relinquish the strict performance of the necessary duties, and the Court would require him to prove strictly the performance of those duties before allowing him any share in the inheritance, when there were natural children or their issue living with the adoptive parents. The necessary duties were stated as follows : "If there is anything to be done on behalf of the parents, the child must leave his own work and perform it. The child must minister to the parent in sickness ; the child must bury the parent, and pay certain ceremonial offerings." In this case the adopted child (a girl) rendered occasional assistance to her adoptive parents after her marriage, but it was held that the occasional assistance did not approach the required standard.

In *Maung Po Sein v. Maung In Dun*,² the question was whether an adopted son who, for many years, has lived apart from his adoptive father has been guilty of such negligent and undutiful conduct as to disentitle him to inherit. It would seem that mere separate living does not of itself constitute a disqualification, though the fact, if proved, will shift the burden on the adopted child to prove that he was not negligent to his adoptive father. Where it was proved that the father on his death acknowledged the adopted person as his son and that he (the adopted son) had afterwards, without dispute, performed the funeral ceremony, the latter was said to have discharged the burden rightly.

Separation from adoptive parents if undutiful conduct on the part of an adopted child.

¹ S. J. p. 8 L. B. Chak-Toon
p. 146.

² Civil Appeal No. 44, Septem.
8, 1883, S. J. p. 191.

In *Maung Aing v. Ma Kin*¹ it was laid down that separate living may constitute a disqualification to inheritance by the adopted child, but that the question as to what constitutes separate living depends upon the circumstances of each case. It was suggested, in this case, that the possible reason for disqualification might be that the separate living on the part of the adopted child might indicate a severance of the tie of adoption.

Where an adopted daughter married and lived in a different house from her adoptive father, but the residences were close together and there was no interruption of filial relations, it was held that the continuance of the adoptive state must be presumed.²

In a later case all the above cases were considered and the learned Judge observed :—“Nothing has been advanced in argument to show that the above rulings, which in their main principles seem to me identical, require modification. The plain rule of law is that a *Keiktima* (*i.e.*, adopted) son living apart from his adoptive parents loses his claim to inherit their estate.* But this rule is to be construed with due regard to the circumstances of each case ; and if it is shown that, though living separately, the adopted son maintained the tie of relationship with his adoptive parents, he will not be excluded from the inheritance. The burden of proving that the case is an exception to the strict rule and that the tie of relationship was maintained lies on the adopted son.” In the present case it was held that the adopted son failed to maintain filial relations with his adoptive mother up to the time of her death. So he was excluded from the inheritance.³

Cir. No. 35 Civil, 1893, U. B.

* *Maung Shwe Thwe v. Ma*

* *Ma Gyan v. Maung Kywin* Cir. No. 77 Civil, 1895, U. B.

Saying Civil Second Appeal No. 16, March 15, 1899. Chan-Toon

* *Attathankepa*, section 178.

p. 168.

The natural parents of an adopted child have generally no right to reclaim it from its adoptive parents so long as the child desires to remain with them. But if the child consents to return to its own parents, it should be restored to them. In such cases, the adoptive parents are entitled to recover from the natural parents compensation for the expenses they incurred in bringing up the child. Where the adoptive parents refuse to maintain their adoptive child, they cannot claim from the natural parents any expenses incurred by them in bringing up the child.¹

Natural parents' right to reclaim their child given in adoption.

INHERITANCE.

Unlike the Hindu wife, the Buddhist wife is considered practically on an equality with her husband, and she generally takes an equal part in the management of the family affairs. Consequently she has for the most part an interest equal to her husband's in the family property, and when the husband dies this interest is carefully protected by the law of inheritance.²

A Buddhist wife's right in relation to her husband.

"The first principle of mutual right of inheritance of husband and wife," says Jardine J., "resembles that of joint property of husband and wife, which idea Sandford J., in the case of *Maung Kyin v. Ma Saung*,³ says, must have arisen from the fact of the husband and wife living together and managing their concerns together. The Buddhist law presumes, from the close intimacy existing between husband and wife, that whatever profits they make are the results of their joint care and thrift."⁴ This principle is well illustrated in section 7, *Dhammathat*, where the sons of different wives are dealt with in the following way:—"If the father had property

¹ See *Manu Kyay*, Book VIII, 4.

² Chan-Toon p. 320.

³ 1 Sel. Judgments, p. 27.

⁴ *Maung Shwe Ngon* (representative of *Ma Thin* deceased original Plaintiff) v. *Ma Min Dwe*, Civil Appeal No. 17, July 10, 1882. S. J. p. 11, L.B.

at the time of his marriage, and the second wife none, and if none has been acquired during their marriage, let the property be divided into four shares : let the son of the first marriage have three, and the son of the second one share. If the father had no property, and the second wife had, let the son of the first marriage have one share and the son of the second three." This rule emphasizes the joint interest a husband and a wife have in the results of their mutual efforts in managing a business. The first wife's children participate only in the profits made during the period of coverture of their mother ; and the children of the second wife share among themselves the profits which accrued since their mother's marriage.

Jardine J., has further observed :—" These two principles must be borne in mind, in adjudicating the case according to the spirit of the Buddhist law : the wife is entitled to some share because, while she lives with her husband, she has a joint interest in all the household concerns ; and although the property may have descended from the husband's ancestor, it might be wasted or become profitless if the wife did not do her share in taking care of it. But at the same time the surviving husband or wife is jealously excluded from complete appropriation of what property came direct to one or other, from his or her own family ; such property is not to be diverted in its entirety from the whole-blood to the half-blood or to the step-parent's own family, who are not even blood relations.

" These rules are both observed in the decision of the *Dhammathat* between a daughter and a step-father of some property inherited by the mother from her ancestors during the coverture. The step-father gets half because of his position and duty as husband and partner of deceased ; the daughter gets the other half because the property came from her mother's family."¹

¹ Ibid. See Chan-Toon p. 197.

There is a rule, mentioned by Mr. Gillbanks, which says that husband and wife inherit from each other. But this conjugal right is expressly limited in section 8 of the *Dhammathat*.¹ In *U. Guna v. U. Kyaw Gaung*,² the learned Judge said:—"The property which is acquired together by husband and wife during coverture belongs, according to Buddhist law, to each equally, and there is joint possession, but it seems to be held on the principle of a tenancy in common and not on that of a joint tenancy. It is not only enjoyed equally, but each is entitled to a half of the principal, and can take that half in the event of a divorce.* There is nothing in Buddhist law corresponding with the Hindu law according to the Mitakshara school, where, when one of the co-parceners drops out on death, he leaves absolutely nothing behind him, his interest in the joint estate merely swelling the interest of the co-parceners who outlive him. There seems to be no mention of survivorship in the Buddhist *Dhammathats*. Inheritance is spoken of throughout. If survivorship were the acknowledged principle, only the heirs of the survivor would have a claim on the survivor's death in his turn, but section 32, X, *Manugyé*, gives a share to the parents of the husband or wife who died first. It is only where there is no issue, that the husband or wife takes completely from the other on death. When there are children, their right of inheritance is recognized, as in sections 2, 3, 4, 5, 8, 10, 11 and 12 of the tenth Chapter of *Manugyé*. These provisions show that the deceased is considered to have left property behind, which is inconsistent with the theory of absorption of everything by

Husband and
wife inherit
from each
other.

¹ See s. 8, p. 273 and s. 66, p. 301 *Dhammathat*.

² Cir. No 92 Civil 1895. U. B. Agabeg's 2 Burma L. R. 50, Chan-Toon p. 115.

* Where husband and wife both assent to divorce and no fault is proved, each is entitled to take

back property brought at marriage, and to an equal division of the property that may have been acquired conjointly during marriage. See *Mi Dier Naw v. Maung Tu*, Civil Appeal Septem. 3, 1873, S. J. p. 14.

survivorship. When there is no issue, the position no doubt resembles that of survivorship, but it is also consistent with that of succession, and on the considerations set out above, it may reasonably be held that husband and wife, under Buddhist law, always takes from each other by succession and not by survivorship.¹

Husband's power to sell joint property.

A Burmese husband cannot sell or alienate the joint property of himself and his wife without her consent or against her will.² The property jointly owned by a Buddhist husband and wife should ordinarily be deemed to be in the possession of the former.³ While it is the common practice for a Buddhist husband alone to execute deeds of transfer of the joint property of himself and his wife; a sale by the wife alone of such property, provided that she has her husband's consent to such sale, is valid as a sale by the husband.⁴ The Burmese law recognizes the husband as lord of his household. The wife cannot retain possession of joint property in opposition to her husband. So long as marriage subsists the Courts cannot decree an absolute dominion over it to either husband or wife; but the husband rather than the wife, is entitled to retain possession of it in trust for both.⁵

Second wife's right.

On the death of the husband a second wife has a right to share with a first wife in the property of the husband, although some of it had been acquired since the second marriage. Her share in the joint property of the first marriage will be one-fourth, as compared to three-fourths falling to the share of the first wife.⁶

¹ See also *Ma Naw Za v. Ma Thet Pon*, Second Appeal No. 7, April 5, 1897. P. J. L. B. p. 31 which followed this case.

² *Ma Thu v. Ma Bu* Second Appeal No. 16 Feby. 26, 1891. S. J. p. 578.

³ *Maung On Sin v. Ma O Net*. Cir. No. 80, civil 1894. U.B.

⁴ *Maung Tun Myat v. Raman*

Chetty, Second Appeal No. 69, June 30, 1893. P. J. L. B. p. 37.

⁵ *Maung Ko v. Ma Me* Civil Appeal, March 4, 1874, *Nya Kan Za v. Mi Le*, Civil Appeal No. 114, Novem. 22, 1882. S. J. p. 126.

⁶ *Mi Ka v. Maung Thet*, Civil Appeal, Feby. 24, 1873 : S. J. p. 6 L. B.

A husband or a wife cannot inherit from each other rights of a feudal or official character, nor imitable immovable property the succession to which is governed by special rules.¹

Feudal right or imitable property.

A wife who is unfaithful to her husband forfeits whatever rights she had to the property of her husband at his death, although there may have been no formal divorce.²

Unfaithful wife.

The question as to whether, under the Burmese law, a woman becoming a nun renounces her property and dies a civil death arose in *Mi Min Din v. Mi Hle*,³ and it was held that a nun does not occupy a position analogous to that of a monk. The Methila nuns especially undergo no ceremony of ordination as nuns, but are simply lay devotees corresponding to religious laymen. Consequently there is nothing in the Buddhist law to support the proposition that a woman loses her rights to the property held by her, by reason of her having joined the order of Methila nuns.

Whether a Burmese woman loses right to property by becoming a Methila nun.

The Buddhist law is opposed to the ascent of inheritance,⁴ but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first collateral line, and, in the absence of heirs in that degree, to the grand-father and grand-mother, and, after them, to the next line of collaterals.⁵ In *Maung Shwe Bo v. Maung Pya*, the learned Judge said : "There is no definite rule preferring uncles and aunts to grand-parents. The texts are not unanimous. But there is abundant weight of authority for the preference of parents to brothers and sisters, there is good authority

When inheritance goes by ascent.

¹ *Mi Lan v. Maung Shwe Dain*, Cir. No. 64, Civil 1893. U. B.

⁵ *Chit Kyee v. Maung Pye* Cir. No. 75 of 1895. This case was followed in *Ma Sa Bwin v. Ma Thi*, Civil Appeal No. 122. July 20, 1898 U. B.; and in *Maung Shwe Bo v. Maung Pya*, Second

² *Maung Tok v. Ma Kin* Cir. No. 24 Civil, 1893. U. B.

Appeal No. 327, Feby. 27, 1899.

³ U. B. R. (1903).

L. B. P. J. 524.

⁴ See *Manu Kyay*, X. ss. 1, 18, 19.

for the preference of grand-parents to uncles and aunts, which would be in accordance with the same principle. There is a definite rule in *Manu Kyay* X. 19, by which grand-parents exclude uncles and aunts, and there is no text which explicitly states the contrary rule."¹

Parents and
children.

The rule of division of property as between the surviving husband or wife and their children is that the former takes the dwelling-house and three-fourths of the estate, and the eldest son the remaining one-fourth. According to Mr. Spark's Code (section 68) this one-fourth share "the children divide equally among themselves."² The matter was fully threshed out in *Mi Saung v. Mi Kun*,³ by Jardine J.. At the hearing of the appeal the learned Judge appointed two Burmese assessors of great experience and one of them made a study of the *Dhammathats*. These two assessors were of opinion that they never heard of the younger children sharing in the one quarter share given to the eldest son, or of his share being chargeable with the maintenance of the younger children. They said that where the *Dhammathat* awarded an eldest son a quarter share he took it absolutely and was not entitled afterwards to share with the other brothers and sisters in the other three quarters on the death of the surviving parent.

There is no doubt that the position of the eldest son, the *auratha thagyi* as he is called, is superior to that of the others. Among the Hindus, either in the Punjab or in Bengal, by custom, the eldest son is accorded an extra

¹ Second Appeal No 327 Feby.27, 1899 : P.J.L.B. 524. Chan-Toon p. 479. See also *Mi San Hla Me v. Kya Tun*, Second Appeal No. 90 Novem. 12, 1894, P. J. L. B. p. 116.

² There are authorities in support of the division of one-fourth among the eldest son and his brothers. *Dharma Vilasa*, s. 2 (Pereiro's Collection of portions of

Dhammathats p. 151); *Wayaru* s. 2 (do. p. 142); *Moha Vicchedani* ss. 1, 2 (do. p. 145); *Manusara Shwemyin*, (do. p. 113). The daughters appear to have a claim upon the mother's share for maintenance. (See *Maung Hlaing v. Maung Tha Ka Do*, March 12, 1894, P. J. L. B. p. 65.)

³ Civil Appeal No. 541, Nov. 11, 1882. S. J. p. 115.

share of the paternal property. In section 81, Book X., of the *Manu Kyay* it is said that the *auratha* only has a perfect right to property of his parents. Other children cannot demand property from the surviving parent on the ground that the deceased parent had promised it. Under section 50, the *auratha* has the first choice. During the life of parents, the children have some rights of user, at least while they live with the parents, but without the parents' consent they cannot waste or give away the property.

The *Manu Kyay*¹ awards, on the death of the father, one quarter to the eldest son and three quarters to the mother with the younger daughters ; and, on the death of the mother, one quarter to the daughter and three quarters to the father. In section 13, the rule is laid down for partition when both parents are dead, leaving only daughters ; and in section 14, when only sons are left and when both sons and daughters are left. But there is no rule either in the *Manu Kyay* or any other *Dhammathat*, allowing any but an eldest son or eldest daughter to claim a share until both parents are dead.

It was accordingly found in the above case that younger daughters are not entitled to sue the mother for a share of the property on the death of the father, but must wait until the mother is dead also before they can claim their shares.² In *Ma On v. Ko Shwe O*³ it was held that on the death of one of the parents the eldest son or daughter may claim his or her share, and the remainder of the property vests in the surviving parent for himself or herself and the remaining children.

On the death of Buddhist parents who have, during their life-time, divided the bulk of their property, but have reserved

¹ Secs. 3 and 5, Book X.

1886. S. J. p. 378. See also *Maung*

² This case was followed in
Maung Po Lat v. Mi Po Le.
Civil Appeal No. 71, Novem-
ber 26, 1883 : S. J. 212.

Po Saung v. Ma Ngwe Su, Cir.
No. 63 Civil, 1893 ; and *Maung*
Hmu v. Ma Min Dok, Cir. No. 39
Civil 1895, U. B.

³ Civil Ref. No 1, April 7,

a share for their own support, that share should be divided among the children according to the ordinary rules of succession.¹

Where there is a son competent to assume the parental duty, an eldest daughter by a second wife cannot claim a share in her deceased father's estate during the life-time of her mother.²

Between
brothers and
sisters.

The *Manu Kyay*, Book X, section 18, says:—"If, after the heirs have received their share and established themselves separately, one shall die without leaving direct heirs, let the property *not ascend* to the elder brothers or sisters; let the younger brothers or sisters only of the deceased share it." The principle of this section is that property in the possession of a brother shall not ascend to his elder brothers or sisters, but shall go to the younger brothers and sisters. A property according to the principle of Buddhist law shall not ascend except where there are no other relations.³

Widow and
children of
former
marriage.

Where a father on the death of his wife marries again and dies leaving no issue by the second wife, the child or children of the first marriage take one-eighth of the joint property during the second marriage and the widow seven-eighths.⁴

Widow'
estate.

A special Court, after a full consideration of various authorities, came to the conclusion that a Burmese Buddhist widow has not an absolute interest in the whole of the family property on the death of the husband, but that she has an absolute right in respect of her own share and a life-interest in the remainder, and that she has not the right of absolute disposal of the remainder, but only a power of sale in case of necessity.⁵ In *Nga Shwe Yo v. Mi San*

¹ *Ko-Ti v. Ma Dut*, Appeal No. 113, 1883. S. J. p. 170, L.B.

² *Ma Me v. Mu Myit*, Second Appeal No. 123, Oct. 20, 1893 P.J. L. B. p. 48.

³ See *Mi A Pruzan v. Mi Chu-mra*, Oct. 23, 1874. S. J. p. 37,

⁴ *Mi So v. Mi Hmat Tha*, Civ.

Ref. No. 4, 1883. S. J. p. 177. *Nga Po Thit v. Mi Thaing*, Civil Appeal, Oct. 24, 1873. S. J. p. 18. L.B.

⁵ *Ma On v. Ko Shwe O*, Civil Ref. No. 1, April 7, 1886. S.J. p. 378.

Byu,¹ it was held that children have rights in their deceased father's property as well as the widow. She may use it for necessary subsistence but ought not, except for their benefit, to dispose of it otherwise. In case of sale by her the burden of proving necessity for the sale would rest on the purchaser. In *Maung Hlaing v. Maung Tha Ka Do*,² it was ruled that a widow has absolute power of disposal over one-half of the joint property of herself and her deceased husband. On the death of a father leaving a widow with an *auratha* son and no other children, the widow has an absolute right of disposal over her share of three-fourths of the estate.³ While a widowed mother is alive the children are not entitled to claim partition of inheritance. When the mother attempts to alienate the estate improperly they may possibly be entitled to sue to restrain her from parting with it.⁴

As to the division of property on divorce, see *Divorce*.

An adopted child ordinarily forfeits all claim to a share of inheritance to the estate of his natural parents.⁵ By marrying and living separately from his adoptive parents he does not, by the mere fact of marriage, forfeit his rights of inheritance in his adoptive family. But the burden of proving that he has performed the duties necessary to be performed by an adopted child will be thrown upon him, and in the absence of such proof the Courts will disallow his claim to inherit. Mere occasional assistance on the part of the adopted child is not sufficient to preserve his rights of inheritance.⁶ The second wife is

Adopted
child.

See also *Mi Saung v. Mi Kun thankepa* 155. *Maung Su So v. Civil Appeal No. 54, Nov. 11, 1882. S. J. p. 115 L. B. Chan-Mi Han*, Cir. No. 68, 193, U. B. Toon p. 202 for opinions of the two assessors appointed by Jardine J.

¹ Civil Appeal No. 166, Sep. 30, 1881. S. J. p. 108, L. B.

² Civil Second Appeal No. 210, March 12, 1894. P. J. L. B. p. 65.

³ *Manugyé X*, ss. 3, 5, 7; *Atta-*

⁴ *Maung Hmu v. Ma Min Dok*, Cir. No. 39, 1895, U. B.

⁵ Vide *Manugyé*, Chap. X, S. 26. *Maung Pan v. Ma Hnyi* Civil Appeal No. 109, Nov. 3, 1897.

⁶ *Nga Min Gyaw v. Me Pi*, Civil Appeal, May 28, 1873, S. J. p. 8.

entitled to share with an adopted child in the estate of the deceased husband, although all the property was acquired prior to her marriage.¹ Where after separation from his adopted brothers and his sisters, an adopted son lives with his adoptive mother, such mother succeeds to his property on his death to the exclusion of his adopted brothers and sisters.² Adoptive parents stand in the same position as natural parents and have the same rights so long as the relationship constituted by adoption subsists; parents are also entitled to inherit in the absence of direct descendants.³

Shares of
adopted and
natural
children.

In *Ma Gyan v. Maung Kywin*⁴ it was held that though the texts in the *Dhammathats* are conflicting, the preponderance is in favour of that in *Manugyé* X, 26, and of the equitable interpretation that the adoptive child takes its place in the family just as a naturally born child would do, and that its rights of inheritance depend upon such position in the same way as if it were a natural child. The *Manugyé* grants the adopted child the same share as the natural child would have in the same position, and it is the practice of the Courts to follow the *Manugyé Dhammathat* where possible. It has, in fact, been the practice of the Courts, both in Upper and in Lower Burma, to treat the *kittima* adopted child generally as filling the same position as the natural born child.

The *Attathankepa* in sections 172 to 179 discusses the respective claims of the *Apatitha*, *Kittima*, and *Auratha* sons. The *apathita* son seems to be the same as the adopted son spoken of in section 25, Vol. X of the *Manugyé*. Sections 26 and 27 deal with the *kittima* son. The name *kittima* is not employed in section 25.⁵

¹ *Ma Gun, v. Ma Gun*, Civil Appeal, Septem. 18, 1874: S. J p 23. ² *Hlaing*, May 18, 1898. U. B.

³ *Mi San Hla Me v. Kya Tun*, Nov. 12, 1894: P. J. L. B. p. 116. ⁴ Cir. No. 77 Civil, 1895. U. R.

⁵ *Ma E. Dok v. Maung Ngwe* Toon p. 162, See *Maung Aing v. Ma Kin*, Cir. No. 35. Civil, 1893. U.B Chan-

The children of a divorced wife are not entitled to any share in the property of their deceased father acquired after his marriage with a second or third wife, unless they have continued after their mother's divorce to live and to plan and work with their father.¹ Where a husband and wife were divorced by mutual consent and the young daughter remained till her father's death in the house of her mother and her mother's second husband, and did not renew filial relationship with her own father, and where there was no special contract to a contrary effect at the time of the divorce, the daughter is not entitled to a share of the joint property acquired by the father and the second wife.²

Child of a
divorced wife.

The mere fact of a divorce having taken place between the parents, by mutual consent, with equal division of the parent's joint property, accompanied by the fact that the son by the first marriage has, during his minority, lived with his divorced mother, does not divest the son of his ordinary legal right of inheritance under Buddhist law expressed in the ordinary rule that, "on the death of the father who has married two wives in succession, the child of the first marriage is entitled to one-eighth share in property acquired during the continuance of the second marriage," as propounded by Sandford J. C., in *Nga Po Thil v. Mi Thing*.³ The relationship of husband and wife ends when the parents become divorced, but the relationship of father and son does not end because of that divorce. There is no general and equitable principle to show why a divorce of the parents should deprive the son of his right of inheritance under the ordinary rule of inheritance, as between a father who has married again and the son by the first marriage.⁴ In *Ma Pon v. Maung Po*

¹ *Ma Shwe Ge v. Nga Lan*, Oct. 29, 1884 : S. J. p. 296.

² B. S. J. 18.

³ *Mi Thaik v. Mi Tu*, Sep. 6, 1883 : S. J. p. 18.

⁴ See *Maung Ba Kyn v. Ma Zan Byu*, Novem. 23, 1896 P. J. L. B. p. 299. Chan-Toon pp. 285-286.

Chan,¹ it was ruled that daughters of a divorced wife, who live with their mother and do not maintain filial relations with their father, but live entirely separate from him, are not entitled to a share in his estate when there has been a division of property at time of divorce.²

Illegitimate children.

It is very probable that, among the Burman Buddhists, an exception is made in the case of an illegitimate child when there is no legitimate descendant, in order to prevent the inheritance from ascending or the succession from failing altogether. Regular heirs always exclude illegitimate ones. The illegitimate child cannot inherit except when there are no legitimate children of the deceased father.³ "As regards the prohibition of certain children from inheriting, if there be no good children let the bad inherit, even if the child have been begotten by chance intercourse of its parents; if there be no good (legitimate) children, let the bad (illegitimate) one according to the law laid down above receive the property and bear the debts."⁴ In *Ma Le v. Ma Pauk Pin*,⁵ it was held that when the deceased left legitimate children, his daughter by a damsel, not recognized as a concubine, could not share in the property. In this case Jardine J., has elaborately dealt with the various kind of wives and their children with respect to their rights to inheritance. In *Maung Pyu v. Ma Chit*,⁶ the question was the status of a child born of parents whose union was imperfect in its inception but subsequently regular by marriage, and publicly living together. Here the marriage was at first not made with the consent of the parents of the bridegroom. The man eloped with the woman and disappeared for some time. Subsequently the

¹ Civil Appeal, No. 166, Oct. 10, 1898, U. B.

¹², 1883. *Maung Pyu v. Ma Chit* Cir. No. 75, Civil, 1893 U.B.

² See also *Ma Sein Nyo v. Ma Kywe*, Cir. No. 41, 1894, U. B.

⁴ *Manu Kyay* p. 307; *Manngye* Chap. X. 3 Edn. pp 314, 315, 319.

³ *Nya Ka Yin v. Ma Gyi*, Sep. 3, 1873. S. J. p. 15, I. B. *Ma Le v. Ma Pauk Pin*, appeal No. 91, Dec.

⁵ Appeal No. 91 December 12, 1883. ⁶ Cir. No. 75, 1893, U.B.

man returned and lived near his parents with the woman as man and wife. It was held that imperfection of birth is not cured by subsequent regular union of parents, and that illegitimate grand-children are excluded from inheritance of grand-parents when the latter have left legitimate children surviving them.

The passage in *Manu Kyay*, Book X, paragraph 63, lays down that "if any person being sick shall be assisted by another who is not related to him and dying in the hands of the person he shall bury him; let him take all the property in the possession of the deceased; his parents, children or relatives shall have no share." This rule, in the opinion of Sandford J., "might be productive of the highest inconvenience and injustice." And there cannot be any doubt about it. For instance, where a man dies in a foreign country or in a distant place having none of his children or relatives with him, and the villager treats him and performs his funeral ceremonics, it would be absurd for the villager to claim the right of inheritance to the deceased's property. Or for instance, if a man dies in a village, and his children and relatives are too poor to pay the funeral expenses and somebody else pays them, the latter cannot claim the whole property of the deceased; all that he is entitled to are the expenses of funeral ceremonics &c., actually incurred by him. It was accordingly held that, only when actual neglect or desertion is shown on the part of those who would otherwise be entitled to inherit, is the person who assists in sickness and buries in death entitled to exclude the heirs from the inheritance.¹ A hired attendant who attends members of a family during their sickness and buries them with means derived from the family estate does not thereby acquire a right to inheritance in that estate.²

Inheritance
by persons
giving assist-
ance in sick-
ness and
performing
funeral rites

¹ *Nga San Yun v. Nga Myat Chit Twer*, Appeal No. 67, Oct. 26, Thin, Civil Appeal, Feby. 27, 1875. ¹ 1898, followed *Nga San Yun v. S. J.* p. 46, L. B. *Nga Myat Thin*, S. J. p. 46.

² *Maung Shwe No v. Maung*

WILL.

The Buddhist in practice has no testamentary power which can prevail against the established rules of inheritance.¹ The question whether the Will as known to the English law has any place in the Buddhist law was discussed in the course of an argument in a certain case before Sandford J., and the conclusion to which the discussion led was that "the idea of a Will to take effect after death upon property not actually passing into the possession of the legatee was foreign to Buddhist law, and that no Will can cause the devolution of property contrary to the law of inheritance." The learned Judge, however, observed that this point was not actually raised in the reference by the Deputy Commissioner to the Court, nor was it raised by the applicant in his petition for a reference to that Court. "I think it better, therefore, not to pronounce any definite decision upon it," said the learned Judge, "although I am inclined to think that the conclusion above stated is *sound*."²

The Court of the Chief Commissioner, in considering the question of the validity of Wills made by Burmese Buddhists in several proceedings, observed: "No Will by a Burmese Buddhist having heirs, which disposes of property moveable or immoveable, contrary to the Burmese Buddhist law of inheritance, should be admitted as valid. There may possibly be some family customs in some remote part of the province which the Chief Commissioner is unacquainted with, where this rule would not apply. In that case, of course, there would be an exception; and it appears probable that in some cases, as for cruelty, or for a blow, a father or mother may legally disinherit an heir; but as a general rule, and without some special act of the Legislature, the Courts are bound to

¹ *Ma Gyan v. Maung Kywin*, Chin, Feby. 27, 1875. S. J. p. 46
Cir. No. 77, 1895 U. B. L. B.

² *Nga San Yun v. Nga Myat*

decide questions of inheritance between Burmese Buddhists solely by the law of Burmese Buddhists, or by well-ascertained custom."¹

In *Ma Bwin v. Ma Yin*,² a special Court composed of two Judges, has ruled that *a Buddhist cannot dispose of his property by Will*. In the course of his judgment one of the learned Judges, after referring to several authorities regarding the origin of testamentary power of a person, observed as follows :—

"In considering therefore the question of whether a Buddhist can dispose of his property by Will, I start with this principle, that the power making a testamentary alienation of property is not a natural right possessed by owners of property, but is a creation of the Legislature, and that if the law does not confer that right on owners of property, they cannot exercise it. Especially when the law declares who shall be a man's heirs and in what order they are to inherit, the power of alienation during life-time cannot enable the owner of property to defeat the legal claims of his heir by testamentary disposition. While the heir has an indisputable legal title, the claimant under the Will has nothing to rely on but an inchoate gift, or rather, a promise to give on the happening of a certain event, which event has not only rendered the giving impossible by the death of the intended donor, but has also transferred to the heir the property proposed to be given. Now the Buddhist law, while it provides for the succession to property and gives rules for inheritance, says nothing about testamentary alienation. We are therefore nearly in the same position as the Indian Courts were when the question of the validity of a Hindu Will first had to be decided. The Buddhist law on the death

¹ Order of the Chief Commissioner of British Burma (Civil Side). February 14 1866. Cited in a footnote of the Judgment in *Maung Me v. Sit Kin Nga*, Civil

Appeal No. 1887, decided Feby. 12, 1889 : S. J. p. 429.

² Civil Appeal No. 5, 1878, decided January 10, 1880 : S. J. p. 95 L. B.

of a person distributes his estate among certain persons in certain fixed shares, and, like the Hindu law, it nowhere gives the owner of property the power to disappoint the heirs by disposing of his property by Will. I therefore hold that, unless it can be shown that the power of testamentary alienation had been enjoyed and recognized for so long as to become an established usage, and a part of Buddhist law, the Will of a Buddhist cannot be maintained.

"Now as to the question of usage we have had further enquiry made and the result is that, though there can be no doubt that Buddhists have for some years been disposing of their property by Will, yet there is no evidence of such long established usage as would justify the conclusion that the power of testamentary alienation has become a recognized part of Buddhist law.

"The earliest Will of which probate was granted is of the year 1864, and the only case¹ which has been discovered in which the question was authoritatively decided by a superior Court was one decided a few years ago before the Judicial Commissioner, in which he held that a Buddhist could not dispose of his property by Will; and in so doing concurred in the opinion expressed by the Judge of the Court of first instance and the Buddhist assessors who sat with him.

"There was also another case² in 1875 in which the Judicial Commissioner expressed an opinion that no Buddhist Will can cause the devolution of property contrary to the law of inheritance. The question, therefore, of the validity of a Buddhist Will has only recently come before the Courts and there is no evidence of long established usage. It follows, therefore, that the right to make a testamentary disposition of property has not become by usage a part

¹ *Ma Thi v. Ma Nu*, Civil Appeal No. 28, June 26, 1875 S. J. L. B. p. 70.

² *Nya Sun Yun v. Nga Myat Thin*, S. J. p. 46 Civil Appeal, Feby. 27, 1875.

of Buddhist law and as Buddhist law does not confer that right, I am of opinion that a Burman Buddhist cannot exercise it.

"The argument that the Buddhist law does not prohibit testamentary alienation, and that, therefore, property can be so disposed of, I have, I think, sufficiently answered already in the words of Mr. Justice Markby, and in the views which I take of the basis of the testamentary right, and which I think is supported by the best authority, a mere non-prohibition is of no avail. There is no natural right of testamentary alienation, and therefore unless that right be conferred by the Legislature, the heir cannot be deprived of the succession by the testamentary disposition of his ancestor."

This case was followed in *Maung Me v. Sit Kin Nga*.¹ It would seem that after the passing of the decision in *Ma Bwin v. Ma Yin*, the Local Government instituted inquiries in the lower Province in 1881 as to exercise of testamentary power by Burman Buddhists. Meres J., who, in the *Maung Me* case, re-examined the question of the validity of a Buddhist Will, brought into the record all the opinions and evidence collected by the Local Government at the inquiry. The learned Judge himself also collected information and opinions of Burmese gentlemen and others on this question of Buddhist Will, and a large number of European Burmese gentlemen, official and non-official, in the Upper and Lower Provinces, sent full notes. All these notes also were brought into the record. The learned Judge said "the inquiry, I think, brings out clearly that the notion of a Will is not to be traced in the Burmese Buddhist Scriptures.... On the full review of the whole question, I concur in the opinion laid down in *Ma Bwin v.*

¹ Civil Appeal No. 76 of 1887. p. 429
Decided February 12, 1889, S. J.

Ma Tin that the testamentary power is not in a Burmese Buddhist." Regarding the argument, *viz.*, that the Buddhist law does not prohibit the making of Wills, his Honour said: "I think that argument is sufficiently disposed of in the judgment in *Ma Bwin v. Ma Tin*."

Family arrangement.

Among Burman Buddhists the father, fore-seeing that the heirs may quarrel about the division of the property on his death, not infrequently arranges a special contract before his death among his heirs whereby they bind themselves to accept a certain method of partition, but such an arrangement will not usually give them a cause of action against him during his life.¹

Inheritance among Hindu Buddhists of Arakan and Chittagong.

In *Ma Tin v. Doop Raj Barna*,² one of the points for determination was what was the law of inheritance to which deceased's estate was subject. The deceased in this case came from Chittagong and was described as a *Mug* or *Rajbansi* and a Buddhist, though he was also spoken of as a Hindu, perhaps because in dress and some habits he resembled a Hindu. The Court held that, *prima facie*, as a Buddhist, deceased would come under the Buddhist law of the country at large, and the *onus* of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance. Whether there was any foundation for alleging a difference of rules except on account of deceased's coming from India and his wearing Hindu dress and following possibly some Hindu habits, there was no distinct evidence to show. But as a Buddhist the presumption no doubt was that there would be no legal impediment, as in the case of a Hindu, to his taking a Buddhist woman to wife.

¹ *Mi Thit v. Maung To Aung*, p. 197, L. B. Appeal No. 62, Oct. 21, 1883, S.J.

² Cir No. 116 Civil, 1894, U. B.

The *Zerbadis* or Burmese Mussulmans reside in Upper Burma. They as often as not speak Burmese alone; they speak Hindustani also indifferently. Both men and women, as a rule, go by both Burmese and Indian names. Prior to the British annexation, their affairs, so far as they came before the Court, used to be governed by the Buddhist *Dhammathats*, as they had no option; under the Burmese Government the *Dhammathats* were applicable to everybody. But since the annexation, in matters of inheritance, the Mahomedan, and not the Buddhist, law is applicable to them.¹

Among the Chins the mode of dividing a joint family property is this: the Chin elders divide the property, and the interested parties touch the pipe or tube for sucking *kaung* from the *kaung* pot in token of their acquiescence. In a case where such division took place and where afterwards one of the parties claimed the whole of the property in repudiation of a previous performance of this kind, the Court held that the plaintiff had accepted the division of property and could not afterwards challenge or go back upon what had been done.² According to Chin custom, if a widow desires to return to her parents and to separate from the family of her husband, she can claim none of her husband's property: she must leave with what she has on her body.³

Buddhist law as administered in Burma is not usually applicable to Chinese residents. Confucians, and Taoists are not Buddhists, and are therefore not exempted by section 331 from the provisions of the Indian Succession Act, 1865.⁴

Kauwin is a property set apart at the time of marriage by the bridegroom or his parents for the joint purposes Kauwin pro-
perty: suc-
cession.

¹ *Ahmed v. Ma Pwa*, Cir. Ibid.
No. 55, Civil, 1895. U. B.

² *Hong Ku v. Ma Thin*, Appeal
No. 4, August 1881. S. J. p. 135
Maung Hmon v. Ma Pyu. Ap-
peal No. 138, Decem, 23, 1896. L. B.

of the married pair. Where property is not set apart as *kanwin*, but is simply entrusted by the parents to the bridegroom to manage, he and the parents shall share it equally. If he dies without children his widow will take half and his parents half.¹

GIFT.

Delivery of possession essential.

Though a Buddhist cannot dispose of his property by a Will he has a right to transfer property *inter vivos* by way of gifts. A gift, to be complete, must be accompanied by delivery and be followed by possession. The delivery into possession is an indispensable condition of the validity of a gift.² In *Maung Ni v. Nga Po Min* it is further laid down that even though there be a written deed of gift, or though the name of the donee at the instance of the grantor be entered in the revenue register but there be no delivery into possession, the gift will not be complete.³

Religious usage : an exception to the general rule,

In the *Mann Kyay Dhammathat*⁴ it is clearly laid down that the absence of delivery into possession shall not invalidate a gift given on the occasion of the child entering the priesthood : the gift, though it remains in the possession of the donors, is to become the separate property of the donee, and the other children of the donors are to have no share. In *Nga Pan U. v. Mi Kyu*⁵ the subject-matter of dispute was certain moveable property given to the deceased husband of the plaintiff by his parents on his entering the priesthood. The Court held that the gift was a valid one, although unaccompanied by delivery and not followed by possession. The *Dhammathat* allows parents

¹ *Ma Hla Aung v. Ma E.* Appeal No. 54, Dec. 3, 1883. S. J. p. 219.

² *Ma Thi v. Ma Nu*, Appeal No. 28, June, 26, 1875, S. J. L. B. p. 70; *Maung Ni v. Nga Po Min* S. J. L. B. p. 44; *Gura v. San Tun*

Banc. Civil Appeal 120 of 1898, Feby. 1, 1899; *Maung Shwe Thwe v. Ma Saing*, Appeal No. 199 of 1897, Jany. 28, 1898 U. B.

³ S. J. L. B. 44.

⁴ *Ibid* p.p. 317, 318.

⁵ July 17, 1874, S. J. L. B. p. 30.

to have the use of property, and only gives absolute ownership in the gift to the donee on the death of the parents. The Court accordingly refused to give a decree of immediate exclusive possession of the gift to the wife, or to a representative of the donee as against his parents, the donors, until their death.¹

Where a gift has been accepted under a condition expressed or implied that the donee would support the donor in case of need, the right in the gift will terminate if the donee neglects to fulfil the condition.² But a gift from a parent to a child does not raise by necessity the inference that the child is bound, by a condition of the gift, to support the parent in case of need. For so to rule would be to shake the security of property, by invalidating every gift from a parent to a child, unless it were made with an express condition that it was absolute.³

The *Manu Kyay* has expressly dealt with gifts from affection.⁴ These gifts are divided into two classes :—

Conditional gift.

Revocation of gift.

(1) Gifts made from affection when the donor has become poor.

(2) Gifts from parents to their children.

In the first case the gift is revocable at the pleasure of the donor, so long as the gift is in possession of the donee, unless the donee has become equally poor with the donor. In the second case, the rule is that where parents from affection have made presents to their children, if they wish to take back their gift during the life-time of the children, they have the right to do so.

In *Mra Do Anng's*⁵ case mentioned above, the Court, although under Buddhist law a donor who has become poor may revoke his gift, declined to apply the law where

¹ See *Maung Ni v. Nga Po Min*, S. J. L. B. p. 44, another case on the point.

² See *Manu Kyay* pp. 228, 297 and 298.

³ *Mra Do Anng v. Shwe U*, March 23, 1874: S. J. L. B. p. 22.

⁴ See *Ibid* p. 228.

⁵ S. J. L. B. p. 22.

a gift of immoveable property had been perfected by ten years' possession, and where the donee's name had been registered as owner.

Death-bed
gift.

In *Ma Thi v. Ma Nu*¹ a claim to certain property was based on a document which was alternately argued as a Will and as a deed of gift. It appears that a very old woman, shortly before her death, purporting to convey everything she possessed to one member of the family with whom she had been living to the exclusion of all the others, executed a deed in favour of that person. But this transfer was apparently not followed by possession. For the Court rejected the claim holding that under Burmese law delivery into possession is an indispensable condition of the validity of a gift, even though there be a written deed of gift or (still stronger) though the name of the donee at the instance of the grantor be inscribed in the government register, as held in the case of *Maung Ni v. Nga Po Min*.² The Court further suspected that the alleged gift was made under undue influence.

Verbal gift,
whether
valid; *donatio
mortis causa*.

A Burmese woman was the mortgagee in possession of certain land and a garden. She was on bad terms with her husband, and anxious to dispose of her property to others as effectually as possible during her life-time. So a few days before her death, she sent for the mortgagor's representative and in her presence made over the mortgage-deed to M.O. as trustee for her minor grand-children and told her if she wished to redeem she must pay them. M.O. accepted the trust. On the day of her death she executed a deed of gift in favour of her minor grand-children, but it was not registered during her life-time. It was contended that there was a complete gift verbally on the occasion when the mortgage-deed was handed over to M.O. the trustee, and that the document was merely executed for greater caution. It seemed that not until her death, did

¹ Appeal No. 23, June 26, 1875.
S. J. L. B. p. 70.

² Civil Appeal, S. J. L. B. p. 44.

either the trustee or the grand-children assume possession of the property. The Judicial Commissioner finding the authorities' conflicting referred the matter to a Special Court. On the basis of *Duffield v. Hicks*,² where the House of Lords held that the delivery of the mortgage deeds of real estate constituted a valid *donatio mortis causa*, the Special Court decided as follows:—"The Statute of Frauds is not applicable here, and a trust of lands may be declared by parol. There was in this case a declaration of trust accepted by the trustee and accompanied by the handing over of the title-deeds. That is a valid *donatio mortis causa*, which must be accompanied by a delivery."³

In *Ma Pwe v. Maung Myat Tha*,⁴ the point for decision was whether a man by becoming a Buddhist monk ceases *ipso facto* to own property of which he was possessed before he abandoned his lay-condition. Or, in other words, does a Buddhist layman upon conversion into a religious person die a civil death in respect of the ownership of the property he possessed as a layman?

Gift by a
Buddhist
monk.

There appears to be no text expressly declaring what becomes of a man's property when he embraces a religious life, but the sacred books indicate what happens by clear enough implication. In this case the husband of the plaintiff left her and his child and gave up his condition of a Buddhist layman in order to live the religious life of a Buddhist monk. Subsequently he made a gift of certain lands which he possessed before entering the monastery to the defendant, whom the plaintiff sued for the recovery of the lands on the ground of the invalidity of the gift. It was held that the plaintiff's husband retained no interest in the property in the suit after becoming a Buddhist monk.

¹ The rule relating to death-bed gifts is mentioned in *Manusarn Shwemyin Dhammathat* Chap. I, s. 68; *Manu Wunnana*, s. 344; *Menu Kyay* p. 317.

² *Dow and Clark*, I, (1827).

³ *Maung Kyaw v. Maung Shwe*

To, Civil Ref. No. 6 of 1892, Jany. 9, 1893. See *Ward v. Turner*, 1 Wh. and T. L. C. 390 (7th Edn); s.c. 1 Dick. 170 (1752).

⁴ Appeal No. 130 of 1897, Jany. 3, 1898. U. P.

Poggalika
and *Thingika*
gifts.

In section 3, Chapter X, of *Manugyé* it is said—"In *poggalika* gifts, the person to whom the offering is made has a right to keep it. In *thingika* gifts, it becomes the property of the chief of the assembly of priests (*Gaing twin akyi*). After a supporter of religion has made such gifts, he has no right to any further claim on them." See *U Te Za v. U Pyinnya*,¹ as to the authority of *Thathana-baing* and *Thudama* Council in matters of ecclesiastical discipline and control, and the Civil Court's power to interfere with it.

PARTITION.

Between two
sisters.

In a suit for partition of their mother's estate between two sisters who were her sole heirs and successors, the question for determination was what was each sister's right share of inheritance. The defendant, who was about fifteen years older than the plaintiff, contended that she was entitled, as the elder, to a larger share. The District Court gave each a half share partly on a consideration of some texts of the *Dhammathat*,² and partly on the evidence of custom. The Appellate Court, after discussing the various conflicting texts on the subject, remanded the case for additional evidence on certain specified issues. The Court below returned the additional evidence called for, with a finding in favour of the respondent plaintiff. There was no evidence that any of the *Dhammathats* or any particular rule in the *Dhammathats* was observed in practice, and the Court below stated in its finding :—"On the whole I am of opinion that there is considerable evidence that in this part of the country there is a custom of equal division and that, in the division of inheritance made by arbitrators with the consent of the parties, this custom is followed and not one or any of the rules in the *Dhammathats*." The Appellate Court thereupon observed that, although it could not be ascertained

¹ Cir No. 72, 1893 U. B. 81.

² *Manugyé*, Chap. X, s.s. 39 and

in the present proceedings, by having witnesses examined all over the province, whether there was a universal prevalence of the same custom of equality of partition, there was little reason to doubt that the general tendency was in that direction. When a younger brother or sister is brought up by an elder, or is, or has been, dependent on the latter, there may be ground for making a difference in their respective shares. But in the present case the younger sister was grown up at the time of her mother's death and had already been married, and now is married again, so that she was in no way dependent upon the elder sister's care or good offices. The learned Judge said: "So far as this case goes at least, the only rule of Buddhist law shown to be operative in respect of the partition of inheritance between two sisters on the same footing, except as regards age, is that of equality of partition." It was further observed that when the rules were conflicting and uncertain, when there was no proof as to what *Dhammathat* ought to be followed, or what rule ought to prevail, when it could not be shown that a particular direction was a living rule and not merely a dead letter, and when the circumstances of the case were not such as were contemplated by the object of the rule, the Courts might safely accept a custom which there was a reasonable amount of evidence to establish if such custom was consonant with equitable principle.¹ In *Ma Kyi Kyi v. Ma Thein*,² the question for decision was whether Burmese daughters inherited the estate of their deceased parents in equal or unequal shares. It was held, on consideration of all the authorities on the subject, that children of the same parents, dividing an inheritance after their parents' death, take each an equal share.

The principle governing the respective shares of the elder and younger brother in a joint estate is laid down in

Between two brothers.

¹ *Ma Pu v. Ma Sow Mi*, Appeal
No 49, Aug. 31, 1897.

² 3 L. B. R. 8,

section 163 of the *Attathankepa Dhammathat*, according to which the shares are about two-thirds and one-third.¹ There is now a general tendency in favour of equality, and we have seen in the case of *Ma Po*² that the mother's estate was equally divided between two daughters.

Between brothers and sisters.

In *Maung Pan v. Ma Hnyi*³ the estate of a deceased father was divided among a son and two daughters equally. In this case the deceased left two sons and two daughters. Of these the eldest was a son, the second and third, daughters, and the fourth and youngest, a son. It was alleged that the eldest son was adopted into another family. The second child, i.e., the eldest daughter, sued all the other children and claimed one-third of her father's estate. As it was proved that eldest son had been really adopted into another family, the estate was ordered to be divided among the remaining children in equal shares, as there was nothing against partition in equal shares.

Between husband and wife.

With regard to the respective shares of the husband and wife on divorce the following passages in the *Manu Kyay* are to the point :—“ If under the same circumstances (i.e. where both parties have been married before) the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, let each take back the property they brought at marriage ; but of the property acquired since, which is the common property of both, the person wishing to separate shall have no share, the party not wishing to separate shall have the whole, and the person who does shall pay the debts.”⁴ And again :—“ Let the wife, the party not wishing to separate, take the whole of the property acquired after they became man and wife, and let the husband pay the debts mutually contracted during the same time.”⁵

¹ *Ma Gyan v. Maung Kywin*, Appeal No. 109, Novem. 3, Cir. No. 77, 1895, U. B.

1897.

² See *Ma Po v. Ma Swe Mi*, Civil Appeal No. 49, Aug. 31, 1897.

³ *Ibid* p. 336.

⁴ *Ibid* p. 338.

Where husband and wife both assent to divorce and no fault is proved each is entitled to take back property which he or she brought into the common stock on the occasion of the last marriage so far as it has not been expended, and to an equal share in what remains of the property acquired conjointly during the continuation of that marriage.¹ But where a divorce takes place against the wish and without any fault on the part of the wife, the husband may take his separate property.² A woman having a separate establishment from her husband and taking no share in the management of his business, and performing the duties of a wife no more than by receiving his visits, is not entitled to hold the property acquired by her husband, who carried on his business in the house of his first wife, as joint property.³

The publicly adopted child stands in the same position as the real child, and what his or her share would be with reference to the second wife, is set out at length at paragraph 38, of *Manu Kyay*.⁴ From this it appears that the daughter is entitled to her mother's personal belongings and also to one-fourth of the property as her own share while the father lives. On the death of the father she further inherits three-fourths of the remainder, while the step mother gets one-fourth of the three-fourths, i.e., three-sixteenths. In *Ma Gun v. Ma Gun*,⁵ it was held that the second wife is entitled to share with an adopted child in the estate of the deceased husband although all the property was acquired prior to his marriage. Her share will be three-sixteenths only.

On the death of the husband a second wife has a right to share with a first wife in the property of the husband, although none of it had been acquired since the second marriage. Her share in the joint pro-

Between
adopted
child
and step-
mother.

Between
first
and second
wife.

¹ *Mi Due Naw v. Maung Tu*, Septem. 3, 1873, S. J. p. 14.

³ Ibid.

² *Munug Kyin v. Ma Saung*, June 3, 1874, S. J. p. 27.

⁴ Ibid. p. 281.

⁵ Septem. 18, 1874, S. J. p. 23.

erty of the first marriage will be one-fourth as compared to three-fourths falling to the share of the first wife. In the separate property of the husband, the second wife is entitled to a half share.¹

Between step-mother and step daughter.

Property inherited by a father from his ancestor during marriage is not *hnapzon* or joint property of the husband and wife. On his death, leaving a daughter by a previous marriage and a widow, the daughter is entitled to one half and the widow to an equal share. In deciding such a case the Court must be guided by analogy in applying the rule prescribed by the *Dhammathat* for the division between a daughter and her step-father of property inherited during coverture by the mother from her ancestors.²

Between children of first marriage and second wife.

If a father on the death of his wife marries again and dies leaving no issue by the second wife, the child or children of the first marriage take one-eighth of the joint property during the second marriage and the widow seven-eighths.³ This matter came up as a reference before the Chief Court and Jardine J., said:—"The present case has not been argued, and I have not been helped by the Courts below, so I must give a ruling with some doubt. It appears to me that the weight of authority is in favour of the proportions of one and seven, i.e., the son or children of the former marriage get only one share out of eight. This is the rule of the *Manu Kyay* as expounded by Sandford J., and of the authoritative *Wunnana*, and the very recent *Maharicchhedani*. I do not think it clear that I violate the spirit of these Codes if I hold that the one-eighth is the share of the child or all the children of the former marriage, and that the widow is to take the other seven-eighths in a case like the present where

¹ *Mi Ka v. Maung Thet*, Feby. 24, 1873. See also *Manu Kyay*, Dr. Richardson's Translation, para. 7 p. 268, para. 38. p. 281.

² *Maung Shwe Ngon v. Ma Min* Dec. July 10, 1882 S. J. p. 11 L. B.
³ *Mi Se v. Mi Hmat Tha* Ref. No. 4, June, 20 1883; S. J. p. 177.

she has no children. The *Mann Kyay*, Book X, section 10, gives the one share to the children collectively in Dr. Richardson's translation, which I think gives the sense. The husband and wife are heirs to each other. For these reasons I answer the question stated by the Deputy Commissioner in the following terms:—The children of the former marriage take collectively one share out of eight of the property acquired during the second marriage: the widow takes the remaining seven shares." His Honour regretted that "as usual neither the Extra Assistant Commissioner nor the Deputy Commissioner treats the subject as a matter of custom, but purely as a matter of construction of written and codified law. The Deputy Commissioner finds that the rule of division is differently stated in different *Dhammathats* and therefore he has referred the matter here."

ANCESTRAL PROPERTY IN LOWER BURMA.

In Lower Burma an heir's right to a share in ancestral property is not affected by any instructions or Will on the part of a co-heir.¹ On the death of a wife, the husband is entitled to retain possession of his wife's share in ancestral estate, which has been in their separate possession to the exclusion of the wife's mother.² In a question whether or not a sister, living separately, is entitled to inherit from her brother, to the entire exclusion of his widow, ancestral land, which, although there had been no actual partition by measurement or express agreement between the brother and sister, was redeemed by the brother during the marriage and worked by him, it was held that the widow was entitled to retain possession against the sister.³ Mere possession for seven or eight years by a grandfather of land which it is not clear was

¹ *Ia Ur, Mi Saung Ma*, Septem. 3, 1873. Septem 5, 1874. S. J. p. 32.

² *Mi Pyn v. Mi Bon Dok*, Sep.

³ *Mi Tun Byu v. Nga Yan*, 30, 1874. S. J. L. B. p. 35.

his and which he abandons to his daughter does not make the land ancestral property.¹ In a claim to land on the ground of descent from a remote common ancestor, the plaintiff failed to show satisfactory possession or enjoyment of the land claimed within twelve years of the date of the suit, and it was held that the suit was barred by limitation.²

Sale of
undivided
ancestral
property.

Consent of all the co-heirs is necessary to the sale of undivided ancestral property. A sale effected without such consent is invalid even to the extent of the vendor's own share. Sandford J., said :—"Under the recent ruling of the Court a co-sharer cannot sell even his own interest in joint undivided family estate without giving to each one of his co-sharers the option of purchasing. One co-sharer, that is, cannot alienate even his own interest in undivided family estate without consulting his co-sharers and ascertaining their unwillingness to buy him out. This doctrine has its parallel in the rule which prevails in those parts of India which are governed by the strictest Hindu law, where the consent of all the share-holders is necessary even to the alienation of an undivided share."³ After a division of an ancestral estate the holder thereof, being a member of the family, wishing to sell the land falling to his share, must offer it first to his co-heirs; and a sale to a stranger, without such offer being made, is invalid.⁴ The burden of proving the division of ancestral property lies upon the party asserting division.⁵ Separate possession and separate

¹ *Maung Shwe On v. Maung Shwe Nu*, Appeal No. 79 : Octo. 26 of 1898. L. B. P. J. p. 468.

² *Maung Shwe Hmyin v. Ma Pu Ma*, Cir. No. 134, 1893. See also

Maung Tun v. Ma Taw, Appeal No. 145 of 1894, April 22, 1895. P. J. L. B. p. 132; *Ma Kou Y v. Tun E*, 3 L. B. R. 7 ; *Maung Pe v. Ma Hla Win*, Appeal No. 336,

Feby. 27, 1898 L. B. P. J. p. 522.

³ *Mi Te v. Po Maung*, Novem. 24, 1874 : S. J. L. B. p. 41. See *Nga Myaing v. Mi Baw*, Novem. 24, 1874. S. J. L. B. p. 39.

⁴ *Ma Ngwe v. Lu Bu*, Appeal No. 21 July 14, 1877, S. J. L. B. p. 76.

⁵ *Ma Hnin Si v. Ma Hnin Yi*, March 7, 1874. S.J. p. 22.

living will shift the *onus* of proving the property to be joint estate on the party alleging the property to be joint.¹

The right of pre-emption among Buddhists is an incident of the law of succession and inheritance and cannot be separated from it.² By the term "pre-emption" is to be understood the option of purchasing if one of the co-heirs of undivided ancestral property wishes to sell. The passages in the *Manu Kyay Dhammathat* on which this alleged right is founded are section 36, Book VII, and section 1, Book VIII. Sandford J., said: "It may, I think, be concluded from these passages, that, if ancestral property has passed into the hands of third persons, the heirs of the original owner do not possess an absolute right of buying it back. But if the possessor wishes to sell, he must offer it first to them who have a right of inheritance in the land. Now, if this be the law binding on strangers to the original owner who have obtained possession of property that was once ancestral estate, surely it binds much more stringently joint possessors of undivided ancestral property. If a stranger in possession of land which has once formed portion of an ancestral estate, but which by its sale to him has been separated from the estate, is bound, on his wishing to sell, to offer it first to the heirs of the original owner, much more is a co-heir of undivided ancestral property bound, under the law contained in the passages I have cited, to offer it first to those who have a joint right of inheritance with himself."³ His Honour quoted passages from the *Wunnana* and *Thara Shwe-myin* confirming the same view and held that a sharer in undivided ancestral property, if he wishes to sell his share, must first offer his share to his co-heirs, and consequently a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their right.

¹ *Mi Pyu v. Mi Bon Dok*, Sep. 30, 1874. S. J. L. B. p. 35.

P. J. L. B. p. 26.

² *Ebrahim v. Arasi*, Appeal No. 218 of 1892; March 27, 1893. Novem. 24, 1874. S. J. L. B. p. 39.

Pre-emption.

In *Ma Ngwe v. Lu Bu*¹ a co-sharer was the holder of the ancestral estate after its division. It was held in this case that he was bound, if he wished to sell, to offer his share to his original co-heirs. "The original object of the custom," said Sandford J., "is no doubt the desire of keeping family estate in the family, and in interpreting the law I must have regard to its origin and object. Property that has formed part of a family estate is subject, if the possessor wishes to sell, to a right of pre-emption on the part of the members of the family. Whether the possessor be a stranger who has acquired possession by sale or a member of the family who has acquired possession by partition, the principle of the rule, namely, the maintenance in tact of a family estate, equally requires that the other members of the family should have a right of purchase."

Alienation of joint property by husband.

A Burmese husband cannot sell or alienate the joint property of himself and his wife without her consent or against her will.² Property jointly owned by a Buddhist husband and wife would usually be deemed to be in the possession of the former. Under ordinary circumstances the presumption would be that a sale of cattle by a Burman is made with the assent of his wife and is valid if made to a *bonâ fide* purchaser and cannot subsequently be challenged by the wife.³

In *Ma Shwe U v. Ma Kyn*,⁴ two questions were referred to a Full Bench : (i) Whether a Burmese Buddhist husband can validly sell or alienate the *hnapazon* property of himself and his wife without her consent or against her will : (ii) Whether such a sale by the husband, made without the consent of his wife, constitutes a valid transfer of his share and interest in the property sold. The Full Bench upheld the decision of *Ma Thu v. Ma Bu*

¹ Appeal No. 21. 1877, July 14,
S. J. L. B. p. 76.

² *Mg On Sin v. Ma O Net*, Cir.
No. 80 Civil, 1894 U. B.

Ma Thu v. Ma Bu, Appeal
No 1,6, Feby, 26, 1891.

³ B. L. R. 66 (F. B.)

and answered the first question in the negative and the second in the affirmative.

As among the Buddhists children have rights in their father's property as well as the widow, the latter may use it for necessary subsistence but cannot, except for their benefit, dispose of it otherwise. In case of sale by her the burthen of proving necessity for the sale would rest on the purchaser.¹ While a widowed mother is alive the children are not entitled under Buddhist law to claim partition of inheritance. When the mother attempts to alienate the estate improperly they might possibly be entitled to sue to restrain her from parting with it.² An only daughter has not, after her father's death and before partition with her mother, an interest in the estate capable of alienation.³

Widow's power to alienate.

¹ *Nya Shwe Yo v. Mi San Byu*, No. 39, 1895 U. R.
Appeal No. 166 of 1880 Sep. 30, 1881. S. J. p. 108 L. B.

² *My Po Lat v. Mi Po Le*, Appeal No. 71, Novem. 26, 1883. S. J.

³ *My Hmuu v. Ma Min Dok*, Cir. p. 212.

MAHOMEDAN CUSTOMS.

The intimate connection between law and religion in the Mahomedan faith is very great and consequently the authority of law is supreme among Mahomedans. Any variation or modification of that Koranic law,—especially in matters of inheritance and succession,—by family or local custom is usually not permitted. “The Mahomedan law of inheritance is based on *Sura-i-Nissa* in the Koran, which was revealed in order to abrogate the customs of the Arabs, and on the *Hadis* or traditions of the Prophet. According to the principles of Mahomedan law any attempt to repudiate the law of the Koran would amount to a declaration of infidelity, such as would render the individual concerned liable to civil punishment by the *Kazee* in this world and to eternal punishment in the next. No custom opposed to the ordinary law of inheritance which was created to destroy custom, would be recognized by the Doctors of the Mahomedan law, and in our opinion it follows as a natural consequence, that no such custom should be recognized by our Courts which are bound by express enactment to administer Mahomedan law in questions of inheritance among Mahomedans.”¹ In *Jammya v. Diwan*,² the Allahabad High Court observed : “The law which governs these Provinces gives no opening where parties are Mahomedans to a consideration of custom.” The learned Judges referred to section 37 of Act XII of 1887 (Bengal Civil Courts Act), which lays down that whenever it is necessary for a Civil Court to decide any question with regard to succession, inheritance, marriage,

¹ *Per O'Kinealy J.*, in *Hakim Khan v. Gool Khan* 8 Cal. 826 p. 830 (1882).

² 23 All. 20 (1900). The custom proved in this case was the exclu-

sion of daughters from inheritance. But the High Court refused to recognize it on the basis of s. 37 of the Bengal Civil Courts.

caste or any religious usage or institution, the Mahomedan law in the case of Mahomedans shall form the rule of decision, except where such law has by legislative enactment been altered or abolished. Mr. Justice O'Kinealy also had this section in his mind when he said that courts were "bound by express enactment to administer Mahomedan law" to the Mahomedans.

Section 37, it should be noted, is merely directory as to the rule which should form the basis of a decision between Mahomedans on the one hand and Hindus on the other. It refers to the Hindus as well as to the Mahomedans but applies to the Mahomedans of Bengal, North West Provinces and Assam only. We are not aware of any such provisions being in force in any other parts of India.

In disputes between Mahomedans respecting zemindaris during the Marhatta Government, the custom of the country was always followed in preference to Mahomedan law, but they were left at liberty to settle matters as they liked in their own families, or in private disputes. We shall see how in many instances the text of the Koran has been set aside in favour of prevailing customs.¹ Sir Erskine Perry in the Khojas and Memons case,² held that "customs conflicting with the express text of the Koran can be valid among a Mahomedan sect."

In dealing with Mahomedan converts, i.e., people who were originally Hindus, Scott J., (after referring to the Privy Council decision in *Abraham v. Abraham*,³ that in questions of succession and inheritance the Hindu law must be applied to Hindus and the Mahomedan law to Mahomedans, and that this rule refers to Hindus and Mahomedans not by birth merely but by religion also) said :— "But at the same time it is quite clear that where the natives of India are concerned, usage must override the

¹ Vide *Musst. Humeedon Nisa v. Ghoolam Moheevood Deen*, 2 Bor. 38 (1821).

² Vide Perry's O.C. 110.
³ 9 Moo. I.A. 195 (1863).

presumption of general law in matters of inheritance among converts to new religions just as much as in other matters.” And his Lordship concluded by holding that although the Mahomedan law pure and simple, as found in the Koran, is part of the Mahomedan religion, it does not of necessity bind all who embrace that creed.¹ Besides Bombay, custom takes precedence of Mahomedan law in the Punjab, Oudh and Central Provinces.

Primogeniture.

The custom of primogeniture is not unknown among estates owned by Mahomedans. Indeed, there are some decided cases in which the custom of primogeniture has been given preference to the general Mahomedan law. The first case that may be mentioned is the one from the district of Cuttack in Orissa. In this case two younger brothers sued to recover from their elder brother their shares of the property left by their father. The property in dispute was originally granted to the common ancestor of the parties by the Mogul Emperor. It had been held by a succession of elder brothers for a long course of years. The exclusive right of the elder brother to inherit it had been upheld by previous decisions of the Courts. It was accordingly decided that, in the absence of any *sunnads* declaring the contrary, the practice of succession by primogeniture must be accepted as prevailing in the estate. The Regulation XI of 1793 which was made applicable to Cuttack by Regulation XII of 1805 had no application to this, and did not abolish this exceptional course of succession.² In a very recent case which came from Oudh the rule of descent by primogeniture was admitted by the contending parties. The suit was in respect of an estate whose Talookdar was entered in List II of the Oudh Estates Act, *viz.*, as one whose estates according to the custom of the family, on and before the 13th February, 1856, ordinarily devolved on a single heir. One of the questions

¹ *Mahomed Sidick v. Hajee Mirza Mahomed Koyun Beg*, 25 Ahmed 10 Bom. 1 pp. 9, 11 (1885). W.R. 199 (1876).

² *Mirza Mahomed Akul Beg v.*

which incidentally came up for decision was whether the estate descended by lineal primogeniture or by primogeniture by proximity of degree (the only alternative to lineal primogeniture). The Privy Council held that there was no evidence that it was by the latter, in which case the elder in the line was to be preferred among those who were equal in proximity.¹

The custom of primogeniture to the exclusion of females and other heirs was alleged to have prevailed in a Beluch family of the Sunni sect, whose ancestors had for many years settled at Jhajhar in the district of Meerut. The court after reviewing the evidence came to the conclusion that no such special course of descent had been established to prevail in Jhajhar and the district of Bulandshahr, where so many Beluchis and foreigners, who were all Sunnis, had settled; and that no legal origin of such custom was shown; and, if it had been, that no continuance of it had been proved.²

In *Rajah Deedar Hossain v. Rani Zuhoroon Nissa*,³ the question at issue was the right to a moiety of Paraganah Soorjapore in the district of Purnea, and the suit was brought by a party in possession of one moiety of the Zemindari for the recovery of the other on the ground that the estate was, according to family custom, indivisible and devolved entire on every succession. The Judicial Committee held that as the property in dispute was not Jungle Mahal within the provisions of Regulation X of 1800, the family rule, if proved, was abrogated by Regulation XI of 1793; that the descent must be governed, according to Regulation IV of 1793; by the laws of the religious sect to which the litigant parties belonged. The Zemindari in question was therefore divisible among the co-heirs of the deceased Zemindar according to the laws

¹ *Muhammad Imam Ali Khan v. Fidayat-un-Nissa*, 3 All. 723
Sardar Husain Khan 25 I.A. 161 (1881).

(1898); s. c. 2 C. W. N. 737, 2 Moo. I.A. 441 (1841).

² *Muhammad Ismail Khan v.*

of the *Shiah* or *Imameean* sect of Mahomedans to which the parties belonged. The property therefore should descend to the daughters of a deceased brother in preference to the surviving brother.

Widow's right to inherit her deceased husband in preference to the latter's brother.

A widow of the Sunni sect in the district of Lucknow claimed to be entitled by custom to the whole of the share of her deceased husband in a village called Saleh Nagar and to a quarter of the residue of his estate by Mahomedan law. The brother of the deceased opposed her claim. It was held that the widow according to the custom and the entries made in the settlement *Wajib-ul-urz* had a life interest and was entitled to succeed and to inherit the entire moveable and immoveable property left by her deceased husband.¹ In *Makhammad Azmat v. Lalli Begum*² it was found that by the custom of a particular family widows were not allowed to inherit as sharers. This finding was accepted by the Chief Court of the Punjab and ultimately by the Privy Council. In several other cases the Chief Court of the Punjab has recognized as widely prevalent among Mahomedan landholders, as custom that widows should take, as by Hindu law, a life estate in the whole property instead of the specific portion which they would inherit absolutely according to the Mahomedan law.³

Joint family.

Markby J., said : "Where a Mahomedan family adopts the customs of Hindus, it may do so subject to any modification of those customs which the members may consider desirable."⁴ It is not necessary to apply to a Mahomedan family living jointly all the rules and presumptions applicable to a joint Hindu family. In deciding such matters a Judge should see how far those rules and presumptions apply to each particular case. When the

¹ *Mahomed Riasat Ali v. Must. Hasin Bann*, 20 I.A. 155 (1893) : s.c. 21 Cal. 157. But see *Sarupi v. Muhh Ram* 2 N.W.P. 227 (1871).

² 8 Cal. 422 (1881).

³ See Bulnois and Rattigan's

Punjab Customary Law p. 97. See also Rattigan's Digest of Customary Law, p. 20, par 15, (6th Edn.).

⁴ *Suddurtonesw v. Majada Khatoom*, 3 Cal. 694 p. 695 (1878).

members of a Mahomedan family live in commensality they do not form a "joint family," in the sense in which that expression is used with regard to Hindus. In Mahomedan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly.¹ Where there was no allegation that by custom parties had adopted the Hindu law of property a Judge by applying to Mahomedans the presumption of Hindu law, cast the *onus* on the wrong party.²

The office of *Choudharee*,³ like those of *Adhikaree* and *Kulkarnee*, is an hereditary one. The offspring of kept mistresses, whether in Hindu or Mahomedan families, are excluded from any share in *Wuttun* or hereditary office. In a claim by an illegitimate son of a Mahomedan to his father's sixth share of the family *Wuttun*, the office of *Chondharee* of Kulyan Prant in North Konkun, the defence pleaded that an illegitimate son had no title to succeed to such office and that the custom of the country was against such claim. The Zilla Judge dismissed the claim as contrary to the custom of the country. In appeal before the Sudder Adawlut the main grounds were that the case should have been decided by the principles of Mahomedan law, and that even the custom of the country did not warrant the exclusion of illegitimate offspring. The Court, after adverting to the fact that the offices in dispute were partly of Mussulman and partly of Hindu origin, and that the Konkun had been long freed from Mahomedan rule, since which the law that regulated these matters in former times has fallen into disuse and given place to the customs of the Hindus, observed that the evidence in the lower Court showed that succession to such property as that in dispute in the Konkun was confined to legitimate

Illegitimate
son's right to
hereditary
office of
Chandharee of
Kulyan Prant
in North
Konkur.

¹ *Hakim Khan v. Gool Khan* 8 Cal. 826 (1882); *Rupchand Chow-*

dhy v. Latu Chowdhury 3 C.L.R. 97 doubted,

² *Abdool Adood v. Mahomed* *Mahmil* 10 Cal. 562 (1881).

³ Literally a holder of four shares or profits, Wilson's Glossary.

offspring, and the application of this rule by the lower Court in preference to the Mahomedan law was what was intended by the Regulations. The lower Court's order dismissing plaintiff's case was therefore affirmed.¹

Office of
Sajjada-nashin in
Surat.

The expression *Sajjada-nashin* means the person who sits on the carpet on which prayers are offered.² He is not only a *mutawilli* but also a spiritual preceptor. He is the curator of the *dargah*³ where his ancestor lies buried and in him is supposed to continue the spiritual line. It seems that a woman cannot be appointed to this office, nor a child of tender years. The mode in which a *sajjada-nashin* is appointed is described thus:—Upon the death of the last incumbent, generally at the time of what is called the *sium* or *teja* ceremony (performed on the third day after his decease) the *fakirs*, and *murids* of the *dargah* assisted by the heads of neighbouring *dargahs*, instal a competent person on the *gadi*; generally the person chosen is the son of the deceased, or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the life-time of the incumbent. But in every case the person installed is supposed to be competent to initiate *murids* into the mysteries of the *tarikat* (the Holy Path).⁴

In *Sayad Abdulla Edrus v. Sayad Zain Sayad Hasan Edrus*⁵ it was claimed by the plaintiff that the office of *sajjada-nashin* and *khilafat*, or deputyship held by the Edrus family, devolves on the eldest son only and that his

Musst. Humeedoon Nisa v. Ghoolam Mohcood Deen, 2 Borr. 38 (1821).

* *Sajjada*, the carpet on which prayers are offered and *nashin*, the person seated thereon. See Ameer Ali's Mahomedan Law Vol. I p. 345.

* *Dargahs* are the tombs of celebrated *dervishes*, who in their lifetime were regarded as saints.—Ibld p. 345.

* Vide Ameer Ali's M. L. Vol. I p. 346; Herklot's Mahomedan Customs.

* 13 Bom. 555 pp. 362, 566 (1888).

younger brother had no right to it. He alleged that, according to the custom of the country, *Sharek* (the Mahomedan law) and family usage, and according to the deed of appointment given by his grandfather to his father, and by his father to him, the offices of *sajjada-nashin* and *khilafat* and *mutawalli* devolved on him alone as the eldest son and that it was his sole right to take possession of, and manage the shrines and the *wakf* property. Mr. Justice Parsons, after examining the past history of the *sajjada-nashinship* in question, found that there had been from the founder to the father of the parties no less than twenty-seven holders of the office; eight of these were only sons, fourteen were eldest sons, and five were other than eldest sons. Such a course of devolution did not certainly sustain the contention of the plaintiff, that there was any right in the eldest son alone to succeed to the office of *sajjada-nashin*. The custom claimed that the eldest son succeeds by virtue of inheritance, being opposed to the general law, must be supported by strict evidence. But as there was no such evidence, the alleged custom was held to be not proved. In the result the younger son who was in possession of the office by reason of an appointment by his father at a date subsequent to the plaintiff's appointment, and after the father had revoked his appointment in favour of the plaintiff, was maintained in his office by the order of the High Court.

In the case of *Sayad Muhammad v. Fateh Muhammad*¹ the principal question was whether the recently deceased *sajjada-nashin* who managed the institution had the right of appointing in his life-time a person to be his successor, who might be chosen by him from among the founder's kindred excluding another nearer kinsman upon whom the headship and management would otherwise have devolved. The *sajjada-nashin* or headship in question was

¹ 22 I. A. 4 (1894) : s.c. 22 Cal. 324.

of an ancient *Khangah*, or Mahomedan religious establishment, at Pak Patan in the Montgomery district in Oudh. The Privy Council said that the question was to be determined by the evidence applicable to custom, and they were of opinion that the evidence overwhelmingly established the right of the *diwan* or the *sajjada-nashin* to appoint his successor in his lifetime within certain limits, within which limits the plaintiff was, inasmuch as he was both an agnate and a worshipper.

Moslem
converts.

The leading case on the subject of the succession of converted Hindus is *Abraham v. Abraham*¹ where it has been laid down that though, by the fact of his conversion, Hindu law ceases to have any binding force upon the convert, yet it does not necessarily involve a complete change in the relations of the convert in the matter of his rights and interests, and his power over property. The convert, though not bound by Hindu law, may, by his course of conduct after conversion, show by what law he intended to be governed as to these matters². This case related to Native Christians among whom certain classes strictly retain their old Hindu usages, others retain their usages in a modified form, and others again wholly abandon those usages. The Christian convert could, before the Indian Succession Act was passed, elect to attach himself to any one of these particular classes, and he would have been governed by the usage of the class to which he so attached himself. The case of *Jowala Buksh v Dharum Singh*³ has laid down that a single family cannot make a special customary law for itself.

The principles which govern the case of Hindu converts to Christianity have been applied to the case of Hindu converts to Mahomedanism in the Bombay Presidency, such as the Khojas and Cutchi Memons with whose customs and usages we shall deal later on. Sir Erskine Perry's famous decisions in these cases have been followed in

¹ 9 Moo. I.A. 195 (1863).

² 10 Moo. I.A. 511 (1866).

numerous other cases¹ and the principles laid down in these decisions, as summarised by their Lordships in *Bai Baiji v Bai Santok*,² are as follows:—

(i) "That though Mahomedan law generally governs converts to that faith from the Hindu religion, yet (ii) a well established custom of such converts following the Hindu law of inheritance would override the general presumption; (iii) that this custom should be confined strictly to cases of succession and inheritance; (iv) that, if any particular usage, at variance with the general Hindu law, applicable to these communities in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such special custom." These principles may now be regarded as settled and they govern the presumptions of law.

If evidence is given as to general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party, disputing the particular Hindu usage in question, to show that it is excluded from the sphere of the proved general usage of the community.³ It is a well-known principle of law in India, that when a Hindu is converted to Christianity or Mahomedanism, the conversion does not of necessity, involve any change of the rights or relations of the convert in matters with which Christianity or Mahomedanism has no concern, such as his rights and interests in, and his powers over, property.⁴ In *Lastings v Gonsalves*⁵ where the parties were Native Christians, the Bombay Court, following the previous cases, laid down that, where, in consequence

¹ *Jowala Bhuksh v. Dharum Singh*, 10 Moore's I.A. 511 (1866); *Mahomed Sidick v Haji Ahmed*: *Adulla Haji Abdastur v Haji Ahmed*, 10 Bom 1 (1885); *Pannusami Nadan v Dora Sami Ayyan*, 2 Mad. 209 (1880). *Bai Baiji v Bai Santok*, 20 Bom. 53 (1894), and a number of cases mentioned

therein.

² 20 Bom. 53 (1894).

³ *Bai Baiji v. Bai Santok* 20 Bom. 53 (1894) See *Abdul Kader Haji Mahomed v. C.A. Turner* 9 Bom. 158 p. 162 (1884).

⁴ *Abraham v. Abraham*, 9 Moo. 195 (1863).

⁵ 23 Bom. 539 (1899).

of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which the person attached himself after conversion, and by which he preferred that his succession should be governed.

The general presumption, arising from the intimate connection between law and religion in the Mahomedan faith, is that the Mahomedan law governs converts from the Hindu religion to Mahomedanism. But a well-established custom in the case of such converts who follow their old Hindu law of inheritance would override the general presumption, and a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law, even though it be at variance with both Hindu and Mahomedan law.¹

In the case of *Jowala Buksh*,² already referred to, the plaintiffs, (originally Rajpoot descendants but, subsequently, converts to Islamism) treated the case on the assumption, which they seemed to have made part of their case, that the family though converted to Mahomedanism was to be taken as still conforming to the Hindu law and usages, and that consequently the questions of title raised were to be governed by Hindu law. The Judicial Committee, however, said that they were far from admitting the correctness of that assumption. This case was distinguishable from *Abraham v. Abraham*,³ where a Hindu became a Christian, who, as such, had no law of inheritance defined by statute and, in the absence of such law, was governed by the law by which that particular family intended to be governed; but the written law of India prescribed broadly that in questions of inheritance

¹ *Mahomed Sidick v. Haji Ahmed*, 10 Bom. 1 (1885).

² 10 Moo. I.A. 511 (1866).
³ 9 Moo. I.A. 195 (1863).

and succession the Hindu law is to be applied to Hindus and the Mahomedan law to the Mahomedans, and this, according to the principle laid down in the above case, not only holds good when they are Hindus or Mahomedans by birth but also by religion.

As to whether a Hindu family, converted to Mahomedanism but conforming for several generations to Hindu customs and usages, can by virtue of that retention of Hindu customs and usages set up for itself a special customary law of inheritance, see *infra*.

The custom of taking interest as between Mahomedans is recognized by the Courts. Mr. Justice Phear, in *Mia Khan v Bibijan*, dissented from *Ram Lal Mookerjee¹ v. Haran Chunder Dhur²* and held that Act XXVIII of 1855 (the Usury Act) had repealed the Mahomedan laws relating to usury. His Lordship was of opinion that by "laws relating to usury" the legislature meant laws affecting the rate of interest. Mr. Harrington in his Analysis,³ after remarking that the Mahomedan law forbids the taking of interest for the use of money upon loans from one Mussulman to another, and that the Hindu law permits interest to be taken at prescribed rates only, goes on to say:—"The Hindu legislators have expressly sanctioned, and the Mussulman Government of India appear to have tolerated directly or indirectly, the customary interest of the country which in the plan for the administration of justice proposed by the Committee of Circuit in 1772 is stated to have amounted to the most exorbitant usury. It would seem that for a considerable time past, the prohibition of the Koran and the Hedaya against the taking of interest have been ignored and have ceased to have any legal force in our courts of justice." *Mia Khan's* case was approved by a Full Bench of the N. W. P. High Court,

Usury.

¹ 5 B.L.R. 500 (1870); s.c. 14
W.R. 308.

² Vide Vol I, p. 128. See also 5
B. L. R. p. 507.

³ 3 B.L.R. 130 (1869).

which laid down that section 2 of Act XXVIII of 1855 was the law applicable, to suits on contracts whereby interest was recoverable, and that it applied to such contracts indiscriminately of the creed of the contracting parties.¹

Religious-endowments

It is said over and over again in the law books, that no right of inheritance can attach to an endowment. It is by appointment that one officer succeeds to another, appointment either by the original appropriator, or by his successor or executor, or by the superintendent for the time being, or failing all these, by the ruling power.² Where property has been devoted exclusively to religious and charitable purposes, the determination of the question of succession depends upon the rules which the founder of the endowment may have established whether such rules are defined by writing or are to be inferred from evidence of usage. Where, so far as the will of the founder can be ascertained from the usage of former days, it seemed to authorize a mode of succession originating in an appointment by the incumbent of a successor, the Court would not be authorized to find in favour of any rule of succession by primogeniture solely from the circumstances that the persons appointed were usually the eldest sons.³

In determining whether a disposition of property made by a Mahomedan is or is not valid the intention of the *wakif* may be interpreted by reference to the custom prevailing at the time the *wakf* was made; and if there is found to be a substantial dedication of the property dealt with to

¹ *Kuar Lachman Singh v Pirbhoo Lal* 6 N.W.P. H.C.R. 308 (F.B.) [1874]. See *Surjya Narain Singh v Sirdhary Lall* 9 Cal. 825 (1883).

² See Macnaghten Chap. on Endowments, §§ 5, 6; his Precedents of Endowment cases IX and X and in Appendix No. 52. See also *Sayad Abdula Edrus v. Sayad Zain Sayad Hosan Edrus*, 13 Bom. 555 (1888). See Sajjadashin *supra*.

³ 555 p. 561 (1888) for other authorities mentioned therein.

Shah Gulam Rahmatullah Saheb v. Mahomed Akbar Sahib 8 Mad. H. C. R. 68 (1875); see *Sayad Abdula Edrus v. Sayad Zain Sayad Hosan Edrus*, 13 Bom. 555 (1888). See Sajjadashin *supra*.

charitable uses, that dedication will constitute a valid *wakf*.¹

In the district of Broach, the mortgage of *wakf* land, or land left as a religious endowment, is permissible by local custom, though such practice is contrary to Mahomedan law.² Similarly in Surat a sale of a *wakf* by custom is allowed.³ A custom may sanction *wakf* of moveables.⁴

A female may be a *mutawalli* of an endowment; so may a non-Mahomedan. But if the endowment be for the purpose of divine worship, neither females nor non-Mahomedans are competent to act in that capacity.⁵ The custom that the office of *mutawalli* should be hereditary must be strictly proved, as it is opposed to the general Mahomedan law.⁶

The Privy Council, in the case of *Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu*,⁷ held that although an instrument purporting to dedicate property as “*fisabilillah wakf*”⁸ and vesting it in members of the grantor's family in succession “to carry on the affairs in connection with the *wakf*,” might include provisions for the benefit of the grantor's family without its operation being annulled, yet, on the other hand, it would not operate to establish a *wakf* as it did not devote a substantial part of the *property* to religious or charitable purposes. The mere use of the expressions “*fisabilillah wakf*” and similar terms in the outset of the deed is not sufficient to establish a *wakf*. It may be a veil to cover arrangements for the aggrandise-

Fisabilillah wakf in the Chittagong district.

¹ *Phulchand v. Akbar Yar Khan* 19 All. 211 (1896). *Cassim Ariff* 10 C. W. N. 449 (1905).

² *Abus Ali Zenul Abuddin v. Ghulam Muhammad*, 1 Bom. H.C.R. 36 (1863).

³ *Fatima Beebee v. Moolla Abdool Futtah* 1 Borr. 124 (1810).

⁴ Wilson's A.M.L. 839 (3rd Edn.). See *Kulsom Bibee v. Golum Hossin*

⁵ Wilson's A.M.L. 337 (3rd Edn.).

⁶ *Sayad Abdula Edrus v. Sayad Zain Sayad Hosan Edrus* 13 Bom. 555, (1888)

⁷ 17 Cal. 498 P.C. (1889).

⁸ *Fi, in, sabil, way, Illah, God,* i.e. In the name of God,

ment of the family and to make their property inalienable. And the gift in question is not a *bona fide* dedication of the property.

Public worship in a Mosque.
"Ameen"
"Rafadain."

If, among the Sunni Mahomedans, the *Imam* of a Mosque pronounces "Ameen" in a loud instead of a low voice, and performs "Rafadain,"—a ceremonial gesture of raising the hands to the ears at a particular point of the service,—that will not be such an important departure from custom as to disqualify him from acting in the Mosque where those ceremonies have not previously been used. There is no general express rule of Mahomedan law, nor any usage among the Sunni communities regulating the tone of voice in pronouncing "Ameen," or forbidding the pronunciation of "Ameen" in a loud tone, or the performance of "Rafadain" during the service. Such practices would not justify a section of the worshippers in setting up another leader of prayer at the same time that the prayer was being conducted by the duly authorized *Imam*.

There is no rule of law which declares that, when public worship has been performed in a certain way for twenty years, there cannot be any variation, however slight, from that method. The question in case of dispute must be as to the magnitude and importance of the alleged departure.¹ The Court ought not to declare that the *imam* or *mutawallis* of the Musjid have authority to eject the dissentients if and when they interfere.²

The Sunnis follow the four Imams, who appear to agree in placing the sources of their law in the following order:—1. The *Koran*; 2. The *Hadis*, or traditions handed down from the Prophet; 3. *Ijma*, or concordance among the followers; and 4. *Kias*, or private judgment. Beyond that the four differ in many details, including the loud "Ameen" and the "Rafadain." No Imam can follow all

¹ *Fazil Karim v. Maula Buksh*, ² *Ibid.*
18 Cal. 448 (P.C.) [1891].

four in everything. But the followers of any are equally orthodox Sunnis. There is nothing in the above authorities to show that the Sunnis of the School of Abu Hanifa would do wrong in following a practice recommended by others of the four Imams.¹

A Mahomedan office to which are attached substantially the conduct of religious worship and the performance of religious duties, is not legally saleable, any custom to the contrary notwithstanding. In *Sarkum Abu Torab Abdul Waheb v. Rahaman Buksh*,² plaintiffs prayed for a decree declaring them to be the *khadims* of a certain *dargah* and as such to be entitled to perform the duties attached to that office for certain days in each month, and during the period to receive the offerings (*nazar-niaz*) made by worshippers at the *dargah*. They claimed their *khadimi* rights partly by inheritance and partly by purchase. They also alleged that for a long time the transferability of the *khadimi* rights by sale had been recognized. Dealing with the question of transferability of such office their Lordships observed : "We very much doubt whether a custom or practice sanctioning the sale of a religious office for the pecuniary benefit, or for the private debts, of the incumbent could under any circumstances be sustained, and we may refer in this connection to what was said by the Privy Council in the case of *Rajah Vurmah Valia v. Ravi Vurmah Mutha*."³ The Court however did not decide the question, firstly as the custom was not set up; secondly, as the evidence in support of the alleged custom or practice was insufficient.

With regard to the rights of a Mahomedan community to perform their religious ceremonies according to their customs and religion in a graveyard, disused for a number of years, but retaining its character as such, even when

¹ *Ibid* pp. 454, 455. See *Ramzon All.* 461 (F. B.) [1885] which was a criminal case.

² 24 Cal. 83 (1896)

³ 4 I.A. 76 (1876): s.c. 1 Mad 235. See also *Rajah Muttu Ramalinga Setupati v. Perianayagam Pillai*, 1 I.A. 209 (1874).

Saleability
of religious
offices :
custom.

such land has been sold to another person, Fulton J., said :—“ By the custom of the country founded on a sentiment which may almost be described as universal, the ground in which human remains are interred is regarded as for ever sacred. The members of the families of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land, granted, as it must be, subject to the custom of the community, carries with it the right to perform all customary rites.” The purchaser of this disused graveyard, who began the foundations of a house thereon, was restrained by an order of the Court from further interference with the land. In this case the Court followed Regulation IV of 1827, section 26, which requires Courts to decide according to the usage of the country.¹

Burial Right.

Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a *dargah* in plaintiff’s land, and the plaintiff sued for an injunction restraining them from exercising this right in future, it was held that the right of burial claimed by the defendants was not an easement, but a customary right, which, being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.² In considering the objection whether this custom of burial can be disallowed as unreasonable Fulton J., said :— “ Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff’s land may be rendered practically useless, if these tombs are multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall v. Nottingham*³ the possibility that the custom there set up

¹ *Ramrao Narayan Bellary v. ‘Bom.* 666 (1899).

Rustumkhan 26 Bom. 198 (1901). ² 1 Ex. D. I. (1875)

³ *Mohidin v. Shivilingappa*, 23

might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property was not thought a sufficient ground for disallowing it. If a custom which allows all lawful games to be played on another person's land at all times of the year is not an unreasonable custom, it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of 'reasonableness' by which the case of *Lutchmeeput Singh v. Sadaulla Nushyo*¹ was decided may have been a good one as regards the alleged right of an indefinite number of persons to fish in the Bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall v. Nottingham* a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property."² Accordingly his Lordship held that the defendants were entitled to claim for a limited class the right of burial in one corner of a field near a *dargah*. The mere possibility that after many years the number of tombs might have increased so much as to deprive the owner of the use of his field or of a large portion of it, was too remote to describe as unreasonable the custom in dispute.

By Mahomedan Law dower is usually of the nature of a debt, and is claimable before the inheritance can be divided.³ A customary dower must be proved by showing a custom of the women of the wife's family to receive, rather than of the men of the husband's family to pay, a certain dower, the Mahomedan dower being the consideration paid by the bridegroom for the marriage, and therefore regulated by the position and conduct of the bride, especially as Mahomedan men often contract most unequal marriages though the means and position of the bridegroom must

Dower.

¹ 9 Cal. 698 (1882).*Beebee Badlan* 2 Sevestre 665² 28 Bom. p. 671.

(1863).

Fuzul-ul Rahman v.

not altogether be excluded from consideration. A verbal contract of dower for a large sum is admissible only when proved by most clear and satisfactory evidence.¹ Where the son relinquished his share in his late father's estate in satisfaction of his mother's claim for unpaid dower, the mother would take the whole estate subject to the claims of other creditors ; for such relinquishment of his share by the son would be *prima facie* absolute. It cannot be said that the son gave up for only the life of his mother, retaining the legal reversion in himself. The Privy Council was of opinion that the creation of such a life estate did not seem to be consistent with the Mahomedan usage, and where such a case was urged there ought to be very clear proof of so unusual a transaction.²

The claim of a Mahomedan widow to hold the property of her deceased husband to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower. The right of a widow in possession is not a lien in the strict sense of the term, although it was so stated in *Ahmed Hossein v. Musst. Khodeejee*.³ Her right is founded on her power as a creditor for her dower to hold the property of her husband of which she has lawfully, and without force or fraud obtained possession, until her debt is satisfied with the liability to account to those entitled to the property subject to the claim for the profits received.⁴ The fact of marriage with a second wife of low status on whom an exceptionally large dower was settled, is not conclusive evidence in

¹ *Shah Nujumooddeen Ahmed v. Beebee Hosseinee* 4 W.R. 110 (1865) : s.c. 8 Seves. Part I 573; s.c. Wyman 48; *Hussuna v Hushumtoonissa* 4 Wyman 9 (1867).

² *Humeeda v Budlun* 17 W.R. 525 (1872) : s.c. in H.C. 2 Seves.

665 (1863).

³ 10 W.R. 368 (1868).

⁴ *Beebee Bachun v. Sheik Hamid Hossien*, 17 W.R. 113 (P.C.) [1871]. See also *Ameroon Nissa v Moorodoon-Nissa*, 6 Moo I.A. 211 (1855).

support of a large claim for dower on behalf of the first wife—albeit she had some status.¹

Under the Mahomedan law, if a wife's dower is "prompt" she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her dower, notwithstanding that she may have left his house without demanding her dower, and only demands it when he sues, and notwithstanding also that she and her husband have already cohabited with consent since their marriage.² When, at the time of marriage, the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to a custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.³ Where a Court following this rule, determined that one-fifth only of a dower of Rs. 5,000, not stipulated to be "deferred," must be considered "prompt", inasmuch as the wife had been a prostitute, and came of a family of prostitutes, it exercised its discretion soundly.⁴

Prompt and deferred dower.

In *Taujik-un-nissa v. Ghulam Kambar*⁵ at the time of the marriage it was not specified whether the dower was prompt or deferred. The plaintiff claimed the entire amount exigible as prompt dower on demand though she claimed in the suit a portion. The defendant contended that in the absence of specification by the custom of the place (Budaün) the entire dower was to be considered as deferred. The lower Court accordingly dismissed the claim of the plaintiff, with reference to what it held to be the custom. The High Court, however, following *Eidan v.*

In the
absence of
specification
of dower, the
Court to
determine its
nature.

¹ *Hossuna v. Hushumtoonissa*, 4 Wyman 9 (1867).

P. H.C.R. 94 (1874).

² *Eidan v. Mazhar Husain*, 1 All. 483 (1877). Followed *Abdool Shukhoor v. Reheemoonnissa*, N.W.

³ *Eidan v. Mazhar Husain* 1 All.

483 (1877).

⁴ *Ibid.*

⁵ 1 All. 506 (1877).

*Mazhar Husain*¹ and another unreported case² mentioned in the judgment, observed thus : " When nothing has been said as to the character of dower, the Court may determine the amount to be considered prompt with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. The reference to custom appears to be in respect of the proportion to be held as prompt and does not appear to have been contemplated to refer to custom to decide whether or not the entire dower should be deferred."

Extravagant
dower :
Court's
discretion.

In the case of the *Collector of Moradabad v. Harbans Singh*,³ in confirming a decree for an extravagant amount of dower (which in this case amounted to more than a crore and a quarter of Rupees nearly) the learned Judges observed : " We cannot but regret that the Courts in these Provinces have not been vested by the Legislature with the discretion which has been conferred on the Courts in Oudh by section 5 of Act No. XVIII of 1876, to award to a Mahomedan lady only so much of the stipulated amount of dower as the Court may consider ' reasonable with reference to the means of the husband and the status of the wife.' "

Where a Mahomedan, a resident in Patna, married the plaintiff while he was for a time in Lucknow where she lived, and on his death, the plaintiff (his widow) claimed to recover from his estate her deferred dower for Rs. 50,000, and where the High Court of Calcutta in reversing the decree of the Subordinate Judge for the full amount decreed for Rs. 5000 only, the Privy Council agreeing with the Subordinate Judge said that the usages and customs of Oudh, rendering dower reducible in certain cases by the Court, did not apply to this case, and that the place of celebration of marriage, which was in this case in Oudh, did not make them applicable.*

¹ All 483 (1877).

* *Habib-un-nissa v. Nizam-ud-din*
decided 31st July, 1877.

² 21 All. 17 (1898).

* *Zukeri Begum v. Sakina Begum*
19 I.A 157, (1892); s.c. 19 Cal. 689.

Under the Mahomedan law a husband has the right to divorce his wife. Amongst the Khojas that right is limited by the necessity of obtaining the consent of his *jamat* according to the custom of the community.¹ Divorce may be made in either of two forms—*tilaq* or *khola*. A divorce by *tilaq* is the arbitrary act of the husband, subject to repayment of her dowry and the relinquishment of any jewels or paraphernalia belonging to her. According to usage it is not complete and irrevocable by a *single* declaration of the husband. A divorce by *khola* is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie; and it is *at once* complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. But seclusion of the wife for a period of some months in both forms of divorce is observed, in order that it may be seen whether she is *enceinte* by her husband, and she is entitled to a sum of money from her husband, called *iddat* for her maintenance.²

An order by a Magistrate directing a Mahomedan husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the Magistrate's orders can no longer be enforced.³ But even after divorce, the maintenance order will have operative force till the expiration of *iddat*.⁴

In the absence of an established local custom to that effect the office of *kazi*⁵ is not hereditary. The enactment

Divorce :
tilaq or *khola*

¹ *Kasam Pirbhai* 8 Bom. H.C.R. (1883); *Suleman Varsi* 1 Bom. L.R. 346 (1899).

Cr. Ca. 95 (1871). *Suleman Varsi* 1 Bom. L.R. 346 (1899).

² *Din Muhammad* 5 All. 226 (1882); *Shah Abu Ilyas v. Ulfa Bibi* 19 All. 50 (F.B.) [1896]; over-rules *Mohibubon* 15 All. 143 (1893).

³ *Buzl-ul-Rahem v. Luteefutoon-nissa*, 7 Sevestre 251 (P.C.) [1856].

⁴ *Kasam Pirbhai* 8 Bom. H.C.R. Cr. Ca. 95 (1871). *Abdur Rohoman* v. *Sakhina* 5 Cal. 558 (1879); *Abdul Ali Ishmailji* 7 Bom. 180

Kazi : his
office and
appointment.

⁵ *Kazi*.—A Mahomedan Judge, an officer formerly appointed by

of Bombay Regulation XXVI of 1827 was adverse to any supposition that the office of *kazi* could be hereditary. The repeal of that Regulation by Act XI of 1864 left the Mahomedan law as it stood before the passing of the Regulation ; and that law sanctions no grant of such office to a man and his heirs.¹ The appointment of *kasi* lies exclusively with the Sovereign, or other chief executive officer of the state, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed ; and though the Sovereign may have full power to make the *vatan* attached to the office of *kazi* hereditary, yet he has, under the Mahomedan law, no power to make the office itself so.² In another case where a *sunnad* granted by the Emperor Aurangzib in 1693 did not purport to confer a hereditary *kaziship*, but was a grant of the office of *kazi* personally to an ancestor of the plaintiff, the Court held that the subsequent recognitions or appointments of members of his family as *kazis* by native Governments did not prove that the office was or could be made hereditary.³

Kharwa
community
of Broach.

The Mussulman Kharwa community of Broach formed a caste by themselves. They were originally Hindus, but turned Mahomedans several years ago, retaining many traces of Hindu manners and customs. They possess the institution of caste, their Panch and their regulation of

the Government to administer both civil and criminal law, chiefly in towns, according to the principles of the Koran ; under the British authorities the judicial functions of the *kazis* in that capacity ceased, and with the exception of their employment as the legal advisers of the Courts in cases of Mahomedan law, the duties of these stationed in the cities or districts were confined to the preparation and attestation of deeds of conveyance and other legal instruments,

and the general superintendence and legalization of the ceremonies of marriage, funerals, and other domestic occurrences among the Mahomedans. Beng. Reg. XXXIX 1793. See Wilson's Glossary.

¹ *Jamal v. Jamal* 1 Bom. 633 (1877) ; *Daudsha v. Ishmalsha* 3 Bom. 72 (1878).

² *Jamal v. Jamal* 1 Bom 633 (1877).

³ *Daudsha v. Ishmalsha* 3 Bom. 72 (1878).

social and domestic matters by the rules framed and resolutions passed by the members as a body—a system in vogue from very ancient times among Hindus. In a suit for restitution of conjugal rights, the parties were members of the Kharwa community at the time of the marriage. Subsequently the plaintiff-husband was ex-communicated from the caste, thereupon the wife left her husband's protection and went to the house of her father. In defence she contended that she could not be compelled by the Court to go and live with her husband before he was re-admitted into the caste. The Court, upholding her contention, held that "at the time of the marriage she was not only Mahomedan by faith but also a member of the Kharwa community. Occupying that *status* she married the husband. Under these circumstances it was of the essence of the marriage contract that they married because they were members of that particular community and they must be regarded as having entered into the matrimonial relation on the basis of that status."¹

Referring to the case of *Abdul Kadir v. Dharma*² Chanda-varkar J., said that "there may be a community among Mahomedans, having its own usages and forming a caste within the meaning of Bombay Regulation II of 1827. That is a distinct recognition by this Court of the existence and legal validity of the institution of caste, in some form or other, among Mahomedans. If a Mahomedan belonging to such community or caste marries a woman also belonging to it, the contract must be presumed, in the absence of evidence to the contrary, to have been entered into upon the faith that, as both are Mahomedans of that caste, both shall continue as such so long as they live as husband and wife."³ In *Abdul Kadir v. Dharma* the Court also held that the term "caste" in section 21 of Regulation II of 1827 was not necessarily confined to Hindus but comprised any

Caste
question
among
Mahomedans.

¹ *Bai Jina v. Kharwa Jina Kalja*

31 Bom. 366 (1907).

² Vide *Bai Jina v. Kharwa Jina*

Kalja 31 Bom. 366 p. 371 (1907)

³ 20 Bom. 190 (1895).

well-defined native community governed for certain internal purposes by its own rules and regulations.

Suni Borohs
in Gujarat.

Suni Borohs in the Northern part of Gujarat were originally Rajpoots and were converted to Mahomedanism some centuries ago. In matters of succession and inheritance they are governed by the Hindu law. In *Bai Baiji v. Bai Santok¹* where the parties were members of the Boroh community of Ranpur, in the Dhandhuka Taluka, it was held that a widow in this community is entitled to succeed to her husband's estate to the exclusion of a daughter or a step daughter.

Similarly Molesalam Girasias of Broach, who were originally Rajpoot Hindus but became Mahomedans several centuries ago, are governed by Hindu law in matters of inheritance and succession. In *Maharana Shri Fatesangji Jasvatsangji v. Kuvar Harisangji Fatesangji²* the plaintiff was the second son of the defendant, who was the Thakoor of Amod, a talukdari estate of the nature of an impartible Raj or Principality. The plaintiff's family belonged to the community of Molesalam Girasias. The plaintiff alleged that the Molesalam Girasias followed the Hindu law and custom in matters of inheritance and partition, and that as the estate was impartible, he, as a second son, of his father, who was the holder of the *gadi*, was entitled by ancient family custom to receive *khoraki-poshaki* (maintenance) suitable to his father's rank and means and also to receive special contributions on occasions of death and birth ceremonies in his family. The High Court found in favour of the plaintiff observing thus: "Taking all these circumstances into account, it cannot be maintained that any special custom derogatory to the general law has been established by which a Thakoor in possession of an impartible *Raj* is absolved from the obligation of providing maintenance to his second son."³

¹ 20 Bom. 53 (1894).

² Ibid p. 188.

³ 20 Bom. 181 (1894).

A *ghair kuf*¹ wife is one who is her husband's social inferior. According to some a marriage is *ghair kuf* which takes place between persons whose families have not previously intermarried. A custom, based upon the *Wajib-ul-urz*, to exclude a *ghair kuf* wife and her daughter was alleged in the case of *Sheikh Hub Ali v. Wazir-un-nissa*.² The wife, a Mahomedan lady, brought a suit to recover possession, as her husband's heir, of his immoveable property. Her claim was opposed on the ground that she was a *ghair kuf* woman and that she and her daughter were therefore, by custom, excluded from inheritance. Apart from the *Wajib-ul-urz* there was absolutely no evidence of any custom on the subject. The only reliable evidence of custom was the village *Wajib-ul-urz*, which, under the heading "transfer of property and right of inheritance" said—"A married wife belonging to a (*ghair kuf*) different caste, and an unmarried wife, or their descendants will, provided they bear good conduct, be entitled to maintenance according to their status; and they will not be entitled to any share whether the property be partitioned or unpartitioned." This document bore the signature, amongst others, of the husband, and commenced with words meaning "by agreement", and so it did not purport to be a record of immemorial custom. The rules of inheritance laid down in it were based not upon Mahomedan but upon Hindu law. Their Lordships held that in the absence of other evidence the entry in the *Wajib-ul-urz* was insufficient to establish the custom.

The Abhans, who appear to be Mahomedans, have *Abhans*. several customs of their own. According to the tribal custom, where a gift is made by way of maintenance it is a gift resumable by the grantor. Such a right to re-

¹ *Kuf* in Arabic denotes equality. ² 33 I. A. 107 (906) : s. c. 28 and a *ghair kuf* wife is one who All. 496 : s. c. 10 C. W. N. 778, is her husband's social inferior.

Ghair kuf
wife : custom
of exclusion
from success-
sion.

sumptions by tribal custom has been found to exist by the Privy Council.¹

Among Kanchans in the district of Delhi the business of brothel-keeping and prostitution is carried on by families or communities who are recruited by adoption. On the death of a woman of this tribe leaving a substantial property her several heirs claimed it. The contest lay between the two sisters claiming customary shares, the two brothers claiming shares by common law, and the third sister contending that none of her father's family had any claim at all. The Privy Council held that certain customs of the Kanchans, which aim at the continuance of prostitution as a family business, are contrary to Mahomedan law, immoral and not enforceable. A Mahomedan woman who is adopted according to one of such customs by the head of a Kanchan brothel is not thereby severed from her family; her property, however acquired, will at her death devolve according to Mahomedan law. Whether she acquires by her adoption any legal rights in the property of the brothel is doubted.²

There is a custom with reference to lands in the Broach district on the *bhagdari* tenure by virtue of which male first cousins, sons of a paternal uncle, inherit such lands in preference to daughters and sisters among Mahomedans.³ In a certain case in point a special custom was alleged regulating the succession to *bhagdari* lands in the Collectorate of Broach to the effect that on the death of a *bhagdar*, whether Hindu or Mahomedan, without male issue, his nearest male relations (after the death of his widow) whether sprung through male or female relatives of the deceased *bhagdar*, succeed to his *bhagdari* lands, to the exclusion of his daughter or sister. The custom alleged

¹ *Najban Bibi v. Chand Bibi, Umrao Jan*, 20 I. A. 193 (1893) : 10 I. A. 133 (1883) : s.c. 10 Cal. s. c. 21 Cal. 149. 238.

² *Bai Kheda v. Dasu Sale b. Ghasiti and Nanki Jan v. Bom. H. C. B. A.C.J 128 (1868).*

was held to have been sufficiently proved.¹ Birdwood J., observed :—“Having regard, therefore, to the foregoing considerations, we should be inclined to recognize the custom in any *bhagdari* village in the Broach Collectorate whenever the party relying on it was able to give specific instances of its continuance in other similar adjacent villages, if not in the particular village itself, though it would always be more satisfactory if he could do this, and whenever the opposite party could not or did not prove the adoption of some other custom or of ordinary rules of inheritance in the particular village, or failing such proof, the general prevalence of such rules or such opposing custom in other similar adjacent villages.”²

Whether males sprung of male relatives of a deceased *bhagdar* have priority over males sprung of female relatives of the same was not decided. Nor was the question whether a daughter or sister of a deceased *bhagdar* is excluded, by the custom, from the line of inheritance, or would, on failure of male relations, succeed to the *bhagdari* lands. His Lordship towards the end of the judgment said :—“We are not to be understood as holding that a daughter or sister is wholly excluded by the custom from the lien of inheritance, i.e., that, if there were not any male relatives of the deceased *bhagdar*, his *bhag* would escheat to the Crown rather than descend upon his daughter or sister.”³

Sir Erskine Perry has described the Memons thus :—

“The Memons were originally, and still are, seated in Cutch from which they have spread themselves into many of the adjoining countries in Western India, and by their own account, even into Malabar and Bengal. By their traditions they were originally Loannas, a Hindu commercial caste in Cutch; but they are not able, and no records are

Cutchi
Memons.

Pranjivan Dayaram v. Bai * Ibid 490.
Reva 5 Bom. 482 (1881).

* Ibid 492.

forthcoming, to indicate the period of their conversion, although there is every reason to believe it must have been some hundreds of years ago. They may be characterized as being more orthodox Mahomedans than the Khojas, and in being in every way their superiors, so far as wealth, numbers and learning are concerned. They make pilgrimage to Mecca, which is unknown amongst the Khojas; and a branch of the caste, the Hala Memons, who are settled in Kathiwar, are said to observe every portion of the Mahomedan law, including the injunctions as to the division of an inheritance."¹

In *Rahimatbae v. Haji Jussap*² it was held that if a custom, as to succession, was found to prevail amongst a sect of Mahomedans and to be valid in other respects, the Court would give effect to it, although it differed from the rule of succession laid down in the Koran. The parties in the case were Cutchi Memons and daughters sued for their shares in their paternal estates in accordance with the Koranic law. Their claim was opposed on the ground of custom. The custom set up was that females were excluded from any share of their father's property at his decease; that they were not entitled to any benefit whatever, except, if they should be unmarried, to maintenance out of the estate, and to a sufficient sum to defray the expenses of their marriage according to their condition in life. Sir E. Perry C.J., in an elaborate and classic judgment, having considered the rigidity of the Koranic law on the one hand and the force of immemorial custom on the other, held that "the attempt of these young women, to disturb the course of succession which has prevailed among their ancestors for many hundred years, has failed."

This decision has been followed in a series of cases. In the matter of *Haji Ismail Haji Abdulla*³ it has been held that Cutchi Memons are not Hindus within the meaning of

¹ Perry's O.C. p. 115.

² 6 Bom. 452 (1880).

³ Perry's O.C. 110 (1847).

section 2 of the Hindu Wills Act (XXI of 1870), and, therefore, probate to take effect throughout India cannot be granted in the case of a Will of a Cutchi Memon testator. They are Mahomedans to whom Mahomedan law is to be applied *except* when an ancient and invariable special custom to the contrary is established. Westropp C. J., said :— “ We do not think that Cutchi Memons can be regarded as Hindus within the meaning of section 242 of the Indian Succession Act, with the clause subsequently added by Act XIII of 1875 which is made applicable to Hindus. We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry’s satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law. That is not enough to bring them within the term ‘ Hindu ’ as used in the Hindu Wills Act. It is admitted that, among such Memons, marriages are celebrated by the Kazi, they attend the Masjid, they belong to the Sunni division of Mahomedans, and make pilgrimages to Mecca. Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.”¹

As to the law of inheritance applicable to Cutchi Memons Sir Charles Sargent C. J., said : “ The ecclesiastical records of this Court show that Khojas and Cutchi Memons have ever since the decree in the case of the Khojas and Memons before Sir E. Perry in 1847 been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahomedanism whilst retaining their Hindu law of inheritance; and so far as Khojas are concerned, the decision of the Court of Appeal in the case of *Hirbai v. Gorbai*² must be taken as conclusively deciding that the *onus* of proving a custom of inheritance not in conformity with Hindu law lies upon those

Law of
inheritance
applicable
to Cutchi
Memons.

¹ Ibid, p. 460.

² 12 Bom. H.C.R. 294 (1875).

who set it up. The above records are even richer in instances of the application of Hindu law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years. I think, therefore, that in the absence of any special ground of distinction, no sufficient reason exists for placing Memons on any different footing from Khojas as regards the application of the Hindu law of inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai v. Gorbai*, in an incomplete state which can only be satisfactorily dealt with by express legislation.”¹

This case was followed in *Abdul Cadur Haji Mahomed v. C. A. Turner*,² where it was held that Cutchi Memons are governed by the Hindu law of inheritance. Scott J., asid:—“The parties belong to the caste known as the Cutchi Memons who, like the Khojas, are Hindus by origin, converted to Mahomedanism, some centuries ago. It is a well known principle of law in India, that when a Hindu is converted to Christianity or Mahomedanism, the conversion does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity or Mahomedanism has no concern, such as his rights and interests in and his powers over property.³ As regards the Khojas, it has been decided by this Court that in questions of inheritance they are governed by the Hindu law in the absence of any proved special custom to the contrary.⁴ But the point is not so clearly settled as regards Cutchi Memons. Sir E. Perry in *Hirbai v. Sonabai*⁵ treated two castes on the same footing, and decided that by their customary

¹ *Ashabai v. Haji Tyeb Haji* I.A. 195).

Rahimtulla 9 Bom. 115 p. 120 (1882).

⁴ *Rahimatbai v. Hirbai*, 3 Bom. 34 (1877).

³ 9 Bom. 158 p. 162 (1884).

⁵ Perry's O. C. 110.

² *Abraham v. Abraham* 9 Moo.

law families were not entitled to a share of their father's property at his death as they would have been according to Mahomedan law, but only to maintenance and marriage expenses. This ruling has been followed and strengthened in the case of Khojas until now they are completely governed by Hindu law in matters of inheritance. But in the case of Memons this Court has decided in *re Haji Ismail Haji Abdula*¹ that Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and the late Chief Justice then added : 'We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point, connected with succession, it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law.' This *dictum* was not, however, necessary for the decision of the point before the Court ; and it has not been followed in subsequent cases. In *Ashabi v. Haji Tyeb Haji Rahimtulla*², the question raised and the present Chief Justice distinctly ruled that Memons as much as Khojas, although converts to Mahomedanism, still retain the Hindu law of inheritance. This ruling, I am informed, has been followed subsequently by Mr. Justice Bayley and Mr. Justice Birdwood, and my own opinion coincides with it."

In *Muhomed Sidick v. Haji Ahmed*³ Scott J., again discussed all the cases on the point, and observed : "I fully concur with these judgments. I have only re-argued the question, because the community showed in the course of this case that they are now somewhat desirous of changing the law of inheritance which has hitherto governed them. The general principle is, therefore, that Cutchi Memons are governed by the Hindu law of inheritance in the absence of proof of special custom." Further on his Lordship said :—"It is also pretty clear that a large and

¹ 6 Bom. 452 (1880).

² 19 Bom. 1 p. 13 (1885).

³ 9 Bom. 115 (1882).

influential section of the community, in fact the great majority, wish to follow in future the law of their religion. A good case is thus made out for the consideration of the Legislature, but no case whatever for the interference of a Court of law."

In the matter of *Haroon Mahomed*¹ the appellant was a Cutchi Memon and had been adjudged insolvent with other members of the family. He denied that he was a partner of the family firm. The Court held that he being a Cutchi Memon the rules of Hindu law and custom applied to him and that his position with regard to the family property was to be determined by the same conditions as would apply in the case of a member of a joint and undivided Hindu family.

In a very recent case the Chief Justice of the Bombay High Court said: "It is beyond dispute that in the absence of proof of any special custom of succession, the Hindu law of inheritance applies to Cutchi Memons"² and referred to *Ashabai v. Haji Tyeb Haji Rahimtulla*.³

Power of
alienation
ancestral and
acquired
property.

With reference to the question as to whether Cutchi Memons by a special usage recognize no difference in the power of alienation between ancestral and self-acquired property, the Court found that the alleged custom was not proved, as the custom was not shewn to be uniform or continuous or accepted by the community.⁴

Wills by
Cutchi
Memons.

Wills made by members of the Cutchi Memon community, whereby the testators dispose of property which is proved to be ancestral, are held to be invalid.⁵ According to the Mahomedan law as well as Hindu law persons not in existence at the death of a testator are incapable of taking any bequest under his Will.⁶

¹ 14 Bom. 189 (1890).

⁴ *Mahomed Sidick v. Haji Ahmed* 10 Bom. 1 (1885).

² *Moosa Haji Joonas Noorani v. Haji Abdul Rahim Haji Hamed* 30 Bom. 197 p. 201 (1905).

⁵ *Ibid.*

³ 9 Bom. 115 (1882).

⁶ *Abdul Cadur Haji Mahomed v. C. N. Turner* 9 Bom. 158 (1884).

In *Moosa Haji Joonas Noorani v. Haji Abdul Rahim Haji Hamed*¹ the question was whether on the death of a lady, a Cutchi Memon, her *stridhan* devolves on her husband's brother's son or on her mother. As there was no issue of the marriage, the devolution should be governed by the form of marriage.² If the marriage is in an approved form, the property devolves on the heirs of the husband; but if it is in an unapproved form, the property should descend to the heirs of the deceased lady. Crowe J., held that the marriage was in an approved form and the property in dispute should go to the deceased lady's husband's nephew, who brought the suit. In appeal further evidence of custom was added to the record. The Appellate Court held that the marriage of the deceased lady was in an approved form. Their Lordships referred to a Khoja case decided so far back as 1866,³ in which it was held that, by the custom of Khoja Mahomedans, when a widow dies intestate and without issue property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband. This rule of succession prevailing among Khojas is in accordance with the rule of inheritance applicable to a Hindu widow married in an approved form. It shows that the rule for which the plaintiff in the above case contended agrees with that which governs in a community to which his own bears so close a resemblance. The Appellate Court accordingly affirmed the decision of the original Court.

Descent of
Stridhan.

We take the following history of the Khojas from the "Oriental Cases" decided by Sir Erskine Perry.⁴

Khojas :
their history.

"The Khojas are a small caste in Western India, who appear to have originally come from Sindh or Cutch, and

30 Bom. 197 (1905).

Khatav v. Pardhan Manji 2 Bom.

¹ Vide *Mayukha* Ch. IV s. X.

H. C. R. 276 (1866).

pp. 97-98 Mandlik's Hindu Law.

² Vide Perry's O. C. p. 112.

³ In the goods of *Mulbai ; Karim*.

who by their own traditions, which are probably correct, were converted from Hinduism about four hundred years ago by a Pir named Sadr Din. Their language is Cutchi; their religion Mahomedan; their dress, appearance, and manners, for the most part, Hindu. These latter facts, however, do not warrant the conclusion being drawn, if such conclusion is necessary for decision of the case (and I think it is not) that the Khojas were originally Hindus, for such is the influence of Hindu manners and opinions on all castes and colours who come into connection with them, that gradually all assume an unmistakable Hindu tint. Persis, Moguls, Afghans, Israelites, and Christians, who have been long settled in India, are seen to have exchanged much of their ancient patrimony of ideas for Hindu tones of thought; and, in observing this phenomenon, I have been often led to compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material.

"However this may be, the Khojas are now settled principally amongst Hindu communities, such as Cutch, Kathiawar, and Bombay, which latter place probably is their head-quarters. They constitute, at this place, apparently about two thousand souls, and their occupation, for the most part, are confined to the more subordinate departments of trade. Indeed, the caste never seems to have emerged from the obscurity which attends their present history, and the almost total ignorance of letters, of the principles of their religion, and of their own *status*, which they now evince, is probably the same as has always existed among them since they first embraced the precepts of Mahomed.

"Although they call themselves Mussulmans, they evidently know but little of their prophet and of the Koran; and their chief reverence at the present time is reserved for Agha Khan, a Persian nobleman, well known in contemporaneous Indian history, and whom they believe to be

a descendant of the Pir, who converted them to Islam.¹ But even to the blood of their saint they adhere by a frail tenure; for it was proved, that when the grandmother of Agha Khan made her appearance in Bombay some years ago, and claimed tithes from the faithful, they repudiated their allegiance, commenced litigation in this Court, and professed to the Kazi of Bombay their intention to incorporate themselves with the general body of Mussulmans in this island. To use the words of one of themselves, they call themselves Shias to a Shia, and Sunnis to a Sunni, and they probably neither know nor care anything as to the distinctive doctrines either of these great divisions of the Mussulman world. They have, moreover, no translation of the Koran into their vernacular language, or into Gujarati, their language of business, which is remarkable when we recollect the long succession of pious Mussulman Kings who reigned in Gujarat, and in the countries in which the Khojas have been located. Nor have they any scholars or men of learning among them, as not a Khoja could be quoted who was acquainted with Arabic or Persian, the two great languages of Mahomedan literature and theology; and the only religious work of which we heard as being current amongst them was one called the Das Avatar, in the Sindhi character, and Cutchi language, of which Narayan, the interpreter, has procured me some translated

¹ This is a mistake, I think. From an instructive note I have seen by Lt. Col. Rawlinson, it appears that Agha Khan is a linial descendant of the Sixth Imam, and that a large section of Mussulmans believe this Sixth Imam is again to appear on the earth. It is probable that the Pir, who converted these Khojas, belonged to this Imamy sect of Persia, and hence the reverence for Agha Khan, which is shown by numbers in Persia, and which induced the late

King to bestow to him his daughter in marriage. "The peculiar doctrine of the Ishmaillies, as this section of Mahomedans is called in Persia, is that they believe each successive Imam from Ali to Ismail was an incarnation of the Divine Essence, and further that the incarnation is hereditary in the direct male line; hence Agha Khan is worshipped as a God by all true Ishmaillies."—Col. Rawlinson's Rep. to Govt. of India.

passages, and which, as professing to give a history, of the tenth incarnation in the person of their Saint, Sudr Din, appears to be a strong combination of Hindu articles of faith with the tenets of Islam.”¹

The term Khoja means both “the honourable or worshipful person” and “the disciple.” Its full meaning, as applied to the community, may fairly be taken to amount to “the honourable or worshipful converts.”² They are not Mahomedans proper, nor Hindus. They are a caste converted from the Hindu religion ; and their religion has, since the date of their conversion, been Mahomedan of the Shia division and Imami Ismaili form. In comparatively recent times a schism has occurred amongst them in Bombay. A numerical minority professed to belong to the Sunni division of Mahomedans, insisted that the religion of the Khojas at large was Sunni, that the public property of that community ought to be applied to Sunni purposes and sought to cast off allegiance to H. H. the Aga Khan as Imam of the Shia Imami Ismailis. However, in a suit brought by some of the innovating party with those objects, Sir Joseph Arnould held : “that the Khojas never were Sunnis, but that from the beginning they have been, and (with the exception of the relators and plaintiffs, and their followers in Bombay) still are Shias of the Imami Ismail persuasion.”³

In order to enjoy the full privileges of membership in the Khoja community a person must be one of that sect whose ancestors were originally Hindus, which was converted to, and has throughout abided in the faith of Shia

¹ See also *The Advocate-General ex relatione Daya Muhammad v. Muhammad Husen Huseni* 12 Bom 323 (decided in April, 1866) for the history of the sects of Sunis, Shias, and Shia Imami Ismailis ; history of Aga Khan ; history of Khojas and their relations with the

hereditary Imam of the Ismailis : relations of Aga Khan with the Jamat or public authority of the Khojas of Bombay, &c , &c.

² Vide 12 Bom. H.C.R. 343

³ Vide *Daya Muhammad v. H. Aga Khan* 12 Bom. H. C. R. 323 (1866).

Imami Ismailis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imams of the Ismailis. The Aga Khan, as the spiritual head of the Khojas, is entitled to exercise a potential voice in determining who, on religious grounds, shall or shall not remain members of the Khoja community.¹

In matters matrimonial, the Khojas are regulated by Mahomedan law.² Amongst ordinary Mahomedans marriages are performed by the *kazi* or his *naibs* or deputies.³ The marriages of all Khojas in Bombay used to be performed by him until the schism. Since the schism, however, those Khojas, who regard the Aga Khan as their head, have had their marriages performed by him while the others continue to employ the *kazi* as before.⁴

In *Hirbai v. Sonabai*⁵ Sir E. Perry held that, according to the custom amongst Khojas, females are not entitled to any share of their father's property at his decease. By the custom of the Khoja Mahomedans, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband. If no blood relations of the deceased husband are forthcoming, the property left by the widow belongs to a *jamat*. As to the degree of relationship which will entitle members of the deceased husband's family to succeed has yet remained an open question.⁶

A Khoja having died intestate, and without leaving issue, was survived by his mother (a widow), his wife, and a married sister. It was held that according to the custom of the Khojas, his mother was entitled to the

Matrimonial law of Khojas.

Females not entitled to share, their fathers property.

Widow's right.

¹ *Daya Muhammad v. Muhammad Husen Huseni* 12 Bom. H. C. R. 323 1866.

² See *Pirbhai* 8 Bom. H.C.R.,
or ca 95.

³ *Muhammad Ibrahim v. Gulam*

Ahmed 1 Bom. H.C.R. 236. (1864).

⁴ See *Hirbai v. Gorbai* 12 Bom. H.C.R. 320, 321 per Westropp C. J.

⁵ Perry's O. C. 110.

⁶ *Karim Khatar v. Pardhan Manji* 2 Bom. H. C. R. 292 (1866).

management of his estate, and, therefore, to letters of administration, in preference to his wife or his sister.¹ The widow of a Khoja Mahomedan who has died childless and intestate, succeeds to her husband's estate in preference to his sister.² A son is entitled to obtain partition of ancestral property in his father's lifetime without his father's consent.³ But this right of a son to partition in the lifetime of his father, more especially where moveable property is concerned, is one upon which the greatest doubt and difference of opinion has always prevailed, and consequently there is no presumption in favour of its inclusion in the Hindu law, which, in the absence of proof of custom to the contrary, is applicable to Khoja Mahomedans.

Son's right to partition.

In the case of *Ahmedbhoy Hubebhoy v. Cassumbhoy Ahmedbhoy*⁴ the Court held that it was not established that amongst Khojas in Bombay there was any recognized right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Cutch for a father to give a son who wished for it his share of the family property, both ancestral and self-acquired.

Settled rule
of inheritance
and suc-
cession among
Khojas.

It is a settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance and succession among Khoja Mahomedans, and this rule is held to apply in a case of Khojas at Thana.⁵ But this rule must not be accepted in its widest sense. It is confined only to simple questions of inheritance and succession. It does not apply to the question of partition.⁶ If a custom opposed to Hindu law be alleged to exist

¹ *Hirbai v. Gorbai* 12 Bom. H. C. R. 294 (1875).

534 (1889).

² *Rahimatbai v. Hirbai* 3 Bom. 34 (1877).

⁵ *Shivji Hasan v. Datu Marji Khoja* 12 Bom. H. C. R. 281 (1874); *Hirbai v. Gorbai*, Ibid 294 p. 321 (1875).

³ *Cassumbhoy Ahmedbhoy v. Ahmedbhoy Hubibhoy* 12 Bom. 280 (1887).

⁶ See *Ahmedbhoy Hubibhoy v. Cassumbhoy Ahmedbhoy* 13 Bom. 534 (1889).

⁴ *Ahmedbhoy Hubibhoy v. Cassumbhoy Ahmedbhoy* 13 Bom.

amongst Khojas, the burden of proof rests upon the person setting up that custom.¹

The Khojas, being partly regulated by Mahomedan law, partly by Hindu law and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable and submitted to as legally binding but act upon satisfactory evidence that it has been the general custom and accepted as such by the general majority of the Khoja community.² But evidence merely of the opinion of the leading members of the caste is not enough. Instances must be proved in which the alleged custom has been observed and followed.³

Although a Khoja and his wife are married according to Mahomedan rites, yet at the time of his death, so far as regards the succession of his property, he is a Hindu. If his brothers lived joint with him, his widow would be entitled to maintenance out of his estate while his property devolved on them. According to *Vyavahar Mayukh* which governs Khojas for the purpose of inheritance and succession, when a person inherits the estate of a person deceased, he takes it as an *universitas* with all the rights and liabilities annexed to it. Maintenance of those whom the deceased was bound to maintain and payment of his debts are liabilities which are annexed to the estate in the hands of those who take it.⁴

By the law and customs of Khoja Mahomedans there is a distinction between ancestral and self-acquired pro-

Proof of
custom : less
stringent
rule.

Widow's right
to mainten-
ance.

Ancestral
and self-
acquired
property.

¹ 12 Bom. H. C. R. 294; 3 Bom. 34; *Cassumbhoy Ahmedbhoy v. Ahmedbhoy Hubibhoy*, O. C. 12 Bom. 280 (1887). But in case of partition see above *Ahmedbhoy Hubibhoy v. Cassumbhoy Ahmedbhoy* 13 Bom. 534 (1889).

² 12 Bom. H. C. R. 294; 12 Bom. 280.

³ *Rahimatbai v. Hirbai* 3 Bom. 34 at p. 40 (1877).

⁴ *Rashid Karmali v. Sherbanoo*, 29 Bom. 85 (1904).

erty in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law.¹ Where wealth amassed in trade by an individual is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property; it must be shewn that the property inherited contributed in a material degree to the wealth so amassed.²

Wills by a
Khoja.

In the case of *Gungabai v. Thavar Mulla*³ it was held that in the Will of a Khoja Mahomedan written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right" was a valid charitable bequest. Where, however, the Will was in the vernacular and the word *dharam* was used, the word was held to be too vague and uncertain for the gift to be carried into effect by the Court, the word *dharam* including many objects not comprehended in the word "charity" as understood in English law.

¹ *Cassumbhoy Ahmedbhoy v. Cassumbhoy Ahmedbhoy* 13 Bom. *Ahmedbhoy Hubibhoy* 12 Bom. 280 534 (1889).

(1887). ² 1 Bom. H.C.R. 71 (1863).

³ *Ahmedbhoy Hubibhoy v.*

CHAPTER XI.

MALABAR CUSTOMS.

Under the heading of "Malabar Customs" we propose to deal briefly with customs and usages of people living in Canara, Malabar, Cochin and Travancore. Hindus and Mahomedans of these parts of India are not governed, in matters of succession, by their respective laws. There are three distinct systems prevalent in these countries, which regulate inheritance. *Marumakkatayam* or heirship of sister's son is the principal system which governs people of Malabar of whom the Nairs are the chief factors. Some Nambudri Brahmans and a great majority of Mapilla families of North Malabar also follow the same system of succession. The system, known as *Makkatayam* or descent in the line of sons, prevails among Nambudris at large and also among other people, such as Tiyans, Thiyyas, Tiyars, &c. The third system, *Aliyasantana*, according to which the descent runs in the female line, is followed by the people of Canara.

Nairs¹ form the bulk of the population in Malabar. Nairs. Their domestic system is the most perfect form of joint family. "Each *tarwad* lives in its mansion, nestling among its palm trees and surrounded by its rice lands but apart from and independently of its neighbour." Among Nairs inheritance is regulated by the *Marumakkatayam* whereby family estates devolve on the female lines, so that children are not the heirs of the wife's husband but inherit from and through their mother. They have their own laws and usages which are very peculiar. "Some of them are so well established as to be judicially noticed without proof. But others of them are still in that

¹ As to the origin and early position of the Nairs, *vide Madras Census, 1891, VIII, 222; Logan's Malabar Manual Vol. I. p. 141.*

stage in which proof of them is required before they can be judicially recognized and enforced. The Nairs are persons amongst whom polyandry is legally recognized; and descent of property through females is acknowledged law. The right (and perhaps duty) to adopt females into the family or *tarwad*, when necessary to preserve it, appears to be in accordance with their law.”¹

Nair
marriage.

Though polyandry is legal among the Nairs, it seems to have now died out, as we find from the Report of the Malabar Marriage Commission of 1894 which contains valuable information on the point. “According to the North Malabar witnesses the rule is that the union of a man and woman lasts for life. The wife lives with her husband. Divorces are almost unheard of, or one extremely rare. Respectable people set their faces against polygamy.”² The same rule seems to prevail throughout the greater part of South Malabar.³ As regards freedom to marry, or not to marry, it is conceded to women as well as to men; the rule of Hindu law, which prescribes marriage as indispensable to women, having no obligatory force either among Nambudri Brahmans or among Nairs and Tiyars.⁴

Tali-kettu-
kalyanam and
Sambhan-
dham.

Tali-kettu-kalyanam or marriage by tying the *tali* is indispensable to a Nair girl. It is generally performed before the girl attains her puberty. The ceremony lasts four days and terminates with the tearing of a cloth, the pieces of which are given to the boy and the girl who have been the subject of this sort of mock marriage. For this tearing of the cloth symbolizes a divorce between the pair, as after that they may possibly never see each other again. It is said that if a girl fails to perform this

¹ *T. Raman Menon v. V. P. Raman Menon*, 27 I. A. 231 p. 236 (1900) : s.c. 24 Mad. 78 p. 79, Strange's Manual of Hindu Law p. 403.

² Malabar Marriage Commission Report, 1894, p. 103. ³ *Ibid* p. 36. ⁴ *Ibid* p. 57.

ceremony, she is liable to be excommunicated from her caste. *Sambhandham* is a proper and serious form of marriage. For it is followed by co-habitation. With regard to *sambhandham* the Report of the Malabar Marriage Commission has the following :—“ Many respectable witnesses tell us that no formality, religious or secular, need attach to *sambhandham*, and that in very many cases the consent of the girl and of her guardian are all that is thought necessary. But it is also an undoubted fact that recent usage (especially in North Malabar) tends to surround the occasion of first co-habitation with more or less elaborate ceremonial.”¹

How the Nambudri Brahmans came to settle in Malabar is a matter for antiquarians. But the tradition is that Parasurama, the first King of Malabar, introduced Brahmans into his Kingdom and gave them lands therein. The Nambudris of the present day are supposed to be the descendants of the original settlers. The latter certainly came from the same Aryan stock of Brahmans one finds in other parts of India, but their descendants having been segregated from the original stock and isolated in Malabar for some centuries, adopted the customs and usages of the surrounding people, i.e. Nairs. These customs and usages are at variance with the general principles of Hindu law.

The probable period when Nambudris settled in Malabar is a matter of uncertainty. The late Sir Muttusami Ayyar, however, thought that the event must have occurred before the *Mitakshara* was written, as there is no mention of the *Sarvasvadhanam* form of marriage which was then, and still is, recognized in Malabar. The learned Judge further said that the emigration must have taken place prior to the time of Sankaracharya, the founder of

¹ Mal. Mar. Commn. Report pp. 122-125 (7th Edn.).
21-24. See also Mayne's H. L.

the *Advaita* or non-dualistic Vedic philosophy. For, Sir Muttusami Ayyar said "that it is in evidence that the *acharams* or practices of Nambudris are believed to have been regulated by him." And the great Sankaracharya is said to have lived about the fifth or seventh century. After referring to other "internal evidence," as he styles these facts, Sir Muttusami Ayyar comes to the conclusion that Nambudris must have settled in Malabar more than 1200 or 1500 years ago.¹ Mr. Logan is of opinion that "Nambudris entered and settled in Malabar in large numbers and as an organized body precisely at the time (end of seventh and first-half of eighth century) when the extinction of Perumal's authority was for the first time menaced by the Western Chalukiyas."²

"Whether the first migration was in the seventh century or several centuries before it," says Sir Muttusami Ayyar, "there is enough to show that the personal law which they carried with them is not Hindu law as expounded by the authors of the *Mitakshara*, *Smriti Chandrika*, and *Madhavya*, but ancient Hindu law as it was probably understood and followed about the commencement of the Christian era."³

Difference
between
usages of
Nambudris
and Brahmans
of other
Provinces.

The usages of Nambudris differ on some important points from those of Brahmans in other Provinces. The principal and permanent variations are detailed in *E. I. Nambudri v. E. I. Krishnan Nambudri*.⁴ These

are :—

- (i) The eldest son is alone permitted to marry, the junior sons being allowed to consort with Sudra females.
- (ii) A girl attaining puberty without having contracted marriage does not forfeit her caste.

¹ *Vasudevan v. The Secretary of the Ancient Malabar Tenures of State for India*, 11 Mad. 157 p. Appendix I. 180 (1887).

² Logan's Reports on the Nature

³ 11 Mad. 157 p. 181.

⁴ 7 Mad. 3 p. 15, (1888).

- (iii) Marriage may take place before as well as after a girl has attained puberty.
- (iv) Marriage takes place not immediately but about two years after the completion of the stage of studentship marked by the performance of the ceremony of *samavarthana*.
- (v) A boy on whom the ceremony of *upanayana* or investiture with the thread has been performed may be adopted.
- (vi) Division cannot be enforced.

Nambudris are not governed by the ordinary Hindu law in respect of the management and alienation of their family property. "Their customs in the management and assignment of property do not differ from the customs of Nairs. Impartibility is the rule, and the eldest member is the manager. The eldest member in a Nambudri family, like the eldest member in a Nair family, is called the *karnavan*.¹ The management does not descend from father to son, but invariably devolves on the senior male member however remotely connected, even though the deceased manager may have left adult sons competent to enter upon the management. The only difference between a Nambudri *illam* and a Nair *tarwad* is, that in the former the offspring of the marriage and the married woman become members of the husband's *illam*, while the children of a Nair woman become members of her own *tarwad*. The self-acquired property left undisposed of by a deceased junior male member does not descend to his son, but following the custom of the Nair *tarwad* it lapses to the *illam*."²

Difference
between
Nambudri
and Nair
customs in
the manage-
ment of their
property.

Nambudri Brahmans are governed by Hindu law as modified by special customs adopted by them since their settlement in Malabar. Among them succession is traced

Rule of
succession
among
Nambudris.

¹ *Nambitan Nambudri v. Nam-* ² *Nilakandan v. Madhavan*, 10
bitan Nambudri, 2 Mad. H. C. R. Mad. 9 p. 11 (1886).
110 (1864).

through males and property passes from father to son, whereas, among Nairs, succession is traced through females and property descends from mother to daughter. Thus the mode of tracing succession and devolution of property are in accordance with Hindu law and contrary to *Marumakkatayam* usage.¹

In a very lengthy and learned judgment in the *Vasudevan's* case, the learned Judges have drawn a graphic picture of the distinguishing shades of difference between Nambudri and Nair customs and usages. As these are very interesting and instructive we cannot do better than giving them *in extenso* in their Lordships' language:—“Again, legal marriage is the basis of the law of succession among Nambudris as among Brahmans of the East Coast, while among Nairs there is no recognized connection between marriage and inheritance. Thus, the notion of paternal relation founded upon legal marriage as the cause of inheritance obtains both under Hindu law and among Nambudri Brahmans. Further, a Nambudri woman, in common with a Brahman on this side of the ghâts, takes her husband's *gotram* upon her marriage and passes into his family from that of her father, and perpetual widowhood and incapacity to re-marry on her husband's death are the incidents of marriage both among Nambudris and Brahmans of the East Coast. But among Nairs a woman continues through life to belong to the family in which she is born, and the sexual relation which she forms, or her so-called marriage, operates in law neither to give her the domicile of her husband nor to create a disability in her either to re-marry or to put an end to her marriage at her pleasure during her first husband's life. Moreover, the same rule of collateral succession obtains both among Nambudri Brahmans and other Brahmans in Southern India. Among the former,

¹ *Vasudevan v. The Secretary of State for India*, 11 Mad. 157 p. 160. (1887).

dayadies or distant kinsmen are divided into those who have ten and three days' impurity or pollution, and among the latter, such kinsmen are classified as *gotraja sapindas* and *samanodakas*, the *sapinda* and the *samanodaka* relationship being severally the cause of ten and three days' impurity or pollution, arising from the birth or death of any one so related. Moreover, Nambudris and Brahmans on the East Coast recognize alike the authority of the Vedas and of Smritis, and they have faith in the religious efficacy of ceremonial observances and of funeral and annual obsequies. We may also refer to the ceremony of investiture or *upanayanam* and to the notion of second birth as common to both. The view, therefore, that when Nambudris settled in Malabar they carried their personal law with them, though they changed it in some respects after their settlement on the West Coast, is supported not only by the foregoing facts, but also by the fact that *golramas* of Nambudri Brahmans are said to be the same as those of Brahmans on the East Coast, indicating thereby common descent from the same original ancestors. It was observed by the Privy Council in *Rutcheputty Dutt Jha v. Rajunder Narain Rao*,¹ that when a class of Hindus migrates from one place to another and retains ancient religion, the presumption is, unless the contrary is shown, that they carried their personal law with them to the new settlement. There is, therefore, sufficient foundation for the opinion of the Judge that Nambudris are governed *prima facie* by Hindu law; but it must be remembered that the personal law which they presumably carried with them was the Hindu law as received by Brahmans at the time of their settlement in Malabar, and that it is *not* the Hindu law as modified by customs which have since come into prevalence among Brahmans on the East Coast. For instance, the form of marriage called the *sarvasvadhanam*

¹ 2 Moo. I. A. 132 (1839).

marriage, which is referable to the ancient Hindu law of *putrika putra*, or of the appointed daughter and her son, is still in force among Nambudris as a mode of affiliation, though it is obsolete on this Coast. Another qualification with which Hindu law should be applied to Nambudris consists in their adoption of the territorial law or the usage of Nairs in several respects subsequent to their settlement in Malabar. Under Hindu law, both ancient and modern, partibility is an incident of ordinary Hindu property, coparcenary depending for its continuance upon the mutual consent of co-sharers; but among Nambudris, as among Nairs, family property is not liable to be divided at the instance of any one of the coparceners. Again, self-acquired property merges, on the death of the person acquiring it, into family property as is the case among Nairs. It appears further that the senior male, in point of age, is entitled to management in preference to the representative of the senior branch. We may also mention that among Nambudris, the eldest brother alone usually marries, and the others, as is the case, among Nairs, consort with Nair women otherwise than with the sanction of marriage. Having regard to the evidence on both sides, the conclusion we come to is, that Nambudris are governed by Hindu law, except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu law as it stood at the date of the settlement, though now obsolete, or some *Marumakkatayam* usage.¹¹

* * * * *

“Again, a Brahman woman becomes an outcaste on the East Coast by not marrying at all, or by marrying after she attains her maturity; but in Nambudri *illams*¹² women marry after they attain their maturity, and some

¹¹ *Vasudevan v. The Secretary of State for India*, 11 Mad. pp. 160-163 (1887) *per* Collins C. J., and

Muttusami Ayyar J.

¹² *Illam* is a Brahman's house. It is also called *Manap*.

never marry at all. Further, the adoption of a son as the son of two fathers, or in *dwyamushyayana* form, is obsolete on this Coast, and, according to the evidence taken on Commission in Travancore and Cochin, it is the ordinary form of adoption recognized in Malabar. Further, on the East Coast, no Hindu widow is competent to adopt in the absence of express authority either from her husband or his *sapindas*; but, according to the evidence taken in Travancore, the Nambudri widow has an implied authority to adopt in the absence of express prohibition.”¹

A Hindu widow cannot alienate or, rather, has but restricted powers of alienation. “According to Nair usage, however, women have no doubt full ownership when they are the sole members of their *tarwads*; but the system of law under which they have such ownership is essentially distinct from Hindu law. The *status* and the usage of Nambudri women in other respects are anything but similar to those of the Nair females. The restriction on the disposing power of a Hindu widow is the outcome of her *status* as widow and the austere life prescribed for her by her religion and of the text that Hindu property was designed for religious sacrifices and spiritual purposes. The religion and *status* of Nambudri widows are substantially the same, whilst widowhood and its peculiar religious obligations in the form in which they are recognized among Nambudris are wholly unknown to Nairs. It is, therefore, antecedently improbable that Nambudri women should have adopted Nair usage in respect of the power of disposition only, notwithstanding their custom as to widowhood and its religious obligations.”²

There are three different forms of affiliation prevalent among Nambudris, viz., *adoption*, *appointment*, and *sarvashadanam*. The last two are peculiar to Nambudris, while the first is common to Nambudris and Nairs. In three differ-

Modes of
affiliation
among Nam-
budris.

Ibid pp. 166-167. See also ² Ibid p. 168.

ent ways, again, an adoption may be made: *first*, adoption by ten hands or *pattukayyal datta*, i.e., by the hands of adopters (male and female), the adoptee and adoptee's parents or guardians; *secondly*, adoption by *chamatha*, i.e. by burning a pan of sacred grass; and *thirdly*, adoption by merely taking into the family. This form is usually resorted to by Brahman widows and Nairs in order to perpetuate the family, when it is in danger of being extinct.¹

The person adopted must be of the same tribe as the adopter. There is no limit as to age. The adoption of a sister's son by Nambudris is sanctioned by the customary law of Malabar.² People following *Marumakkatayam* should adopt a female, but, generally, a male also is adopted with her. Where a Nambudri family following *Marumakkatayam* omitted to adopt a female, it was held that such omission did not invalidate the adoption.³

Appointment.

Both Messrs. Wigram and Ramchundra Ayyar⁴ refer to the appointment of an heir as an act of adoption and akin to the *kritima* form of adoption in force in the Mithila country. It takes place without any ceremony. A Nambudri widow, or *antharjanam* as she is usually designated, is at liberty to appoint an heir in order to perpetuate her *illam* in the absence of *dayadies* with ten or three days' pollution.⁵ There is no limit as to the age of the person appointed. A married man with children is eligible for appointment. He must be of the same caste as his adoptive mother. Whether in such appointment of heir it is necessary to direct that he should marry for the *illam* to which he is appointed as heir is doubtful.⁶

¹ Wigram's Malabar Law & Custom. Ramchundra Ayyar's Malabar Law and Custom.

² *E. I. Vishnu Nambudri v. E. I. Krishnan Nambudri* 7 Mad. 3 (F.B.) [1883].

³ *Subramanyan v. Paramaswaram* 11 Mad. 116 (1887).

⁴ See Wigram's Malabar Law and Custom, Chap. I. Ramchundra Ayyar's Malabar Law and Custom, Chap. VI.

⁵ *Vasudevan v. The Secretary of State for India* 11 Mad. 157

⁶ *Ibid.*

The *sarvasvadhanam* form of affiliation is peculiar to Nambudris in Malabar. It closely resembles, if it is not identical, with what is called *putrika-karanam*, or *putrika putra*, among other classes of Hindus. The object is to raise up issue to a father whose line is about to be extinct and to place the son to be begotten from a daughter in the place of a real son.¹ This custom is very likely a survival of the obsolete practice of constituting as heir, the son of an appointed daughter.² The effect of the custom is to introduce the son into the *illam*, to confer on him the status of a son in respect of the property of the *illam*, coupled with the obligation of managing, or assisting in the management of the estate and of supporting the family.³ Sir Muttusami Ayyar says: "The legal import of a *sarvasvadhanam* marriage is nothing more than the adoption of a daughter's son as the son of her father by anticipating at the time of the marriage, coupled with a condition that she should retain the status of her father's *illam* in spite of her marriage. Till the birth of a son her status in the family is that of an unmarried daughter; the relation of marriage was ignored as a jural relation for purposes of inheritance in connection with the *illam*."⁴

The formula used at the marriage is: "I give unto thee this virgin, who has no brother, decked with ornaments. The son who may be born of her shall be my son." Thus the first born son of the marriage becomes the son of the father. Nambudris trace this kind of marriage to Hindu law, and the text of Vasistha,⁵ which is adopted as the formula to be solemnly pronounced during the marriage, discloses a connection between the usage and the ancient Smriti law. But the form of marriage is unknown on the East Coast, nor is it recognized as a mode of affiliation.

¹ *Kumaran v. Narayanan*, 9 (1882).

Mad. 260 p. 264 (1886).

⁴ *Agnithrayan v. Itticheri* 4

² *Malabar Law and Customs*, 5.

Mad. L. J. 303.

³ *Keshava Tharagan v. Rudran Nambudri* 5 Mad. 259 p. 260

⁵ Chap. VI, 12.

Sarvasvadhanam.

Incidents of
sarvasvadhanam
marriage.

By *sarvasvadhanam* marriage the property of the wife does not pass to her husband. He may hold his wife's property in trust for the children to be born of the marriage. If the wife dies without issue, or if there be no issue of the marriage, the property reverts to the *illam* of his wife's father. The husband, notwithstanding this *sarvasvadhanam* marriage, remains a member of his natural family.¹

With reference to the observation in the above passage *viz.*, that if the wife dies without issue the property reverts to the *illam* of his wife's father, we should note that it is merely an *obiter dictum*. The point was fully discussed in a very recent case, where it was held that whether the interest of the son-in-law divests on the wife dying without issue was not concluded by authority.²

Right of the
son of *sarva-
svadhanam*
marriage.

As to the right of the son born of *sarvasvadhanam* marriage, he unquestionably inherits the property of his maternal grandfather, to whom he stands in the position of an adopted son. But, as to his right to inherit in the family of his natural father, it is settled now that he possesses none so long as other heirs exist.³

Illatam.

According to the custom prevailing amongst Nambudris in Malabar a person may be introduced into an *illam* to perpetuate its existence. Such person becomes a member of the *illam* and is *prima facie* entitled to hold the property held by the *illam* as trustee as well as to enjoy the property held by the *illam* as its own.⁴ The practice of *illatam*⁵ is generally resorted to by a person who has no male issue and requires assistance in the management of his family property. The power may be exercised by a man

¹ *Kumaran v. Narayanan* 9 Mad. 260 (1886). See also *Vasudevan v. Secretary of State for India* 11 Mad. 157 p. 164 (1887).

² *A. L. Amma v. P. T. Nambudri* 25 Mad. 662 (1901).

³ *Kumaran v. Narayanan*, 9

Mad. 260 (1886).

⁴ *Keshavan v. Vasudevan*? Mad. 297 (1884); see also *T. M. M.N. Nambudripad v. P. M. T. Nambudripad* Mad. Dices. p. 125 (1855).

⁵ *Illata*, a bride's father having no son and adopting his son-in-law. *Vide Wilson's Glossary.*

who at the time has no son, though he may have more than one daughter and whether or not his hope of having male issue be extinct. But it is not clear whether the affiliation is effected by the mere introduction of a stranger into the family or if it requires for its completion marriage with a daughter. Nor is it clear whether, if the father be dead, the right may be exercised by a surviving paternal grandfather. For the purpose of succession the *illatam* son-in-law stands in the place of a son and, in competition with natural born sons, he takes an equal share. As to his right to inherit the property of his natural father or to demand partition in the life-time of his father-in-law, nothing is definitely settled. It is not safe to consider that the affiliation is, in any other respect, analogous to Hindu adoption, save in the circumstance that the *illatam* is regarded as a member of the family into which he is admitted.¹

In *Chenchamma v. Subbaya*² an issue was raised as to whether there could be coparcenary between an adopted son and *illatam* son-in-law, but, no evidence being produced, it was held, in the absence of proof, that the right of survivorship is an incident of custom, and cannot be treated as suggested. The decision of Scotland C. J., and Innes J., in an unreported case,³ is no doubt in conflict with the later decisions, but no evidence was taken in that case, and it was inferred that there was coparcenary, because the *illatam* custom was a mode of affiliation. We think it is not safe to attach to the usage all the incidents of adoption without specific evidence.⁴

A sonless person having introduced into the family an *illatam* son-in-law can subsequently adopt. Although an *illatam* son-in-law and a son adopted into the same

¹ *Hanumantamma v. Rani varapu Subba Reddi*. Appeal No. *Reddi*, 4 Mad. 272 p. 283 (1880). 103 of 1868.

² 9 Mad. 114 (1885).

³ *Mopur Ademma v. Dhama-*

⁴ *Malla Reddi v. Padmamma*

17 Mad. 48 (1892).

family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindu coparceners having the right of survivorship.¹ The question as to whether an *illatam* son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence.²

Illatam
among other
castes.

The custom of *illatam* obtains among the *Motali*, *Kapu* or *Reddi* caste in the districts of Bellary and Kurnool.³ The *illatam* son-in-law does not thereby lose his rights of succession to the estate of his natural father's divided brother.⁴ There is no evidence that the custom of *illatam* exists among the *Kondarazu* caste of the Vizagapatam district.⁵

Right of the
eldest mem-
ber of a Nam-
budri family.

The right of the eldest member of a Numbudri family to manage the property as *karnavan* is absolute. Where a junior member has in fact managed it, this is presumed to have been with the eldest member's permission, and the latter may at any time interfere and take the actual control.⁶

Numbudri
widow's
power of alie-
nation and
adoption.

A Numbudri widow, who is the sole surviving member of her *illam*, is not at liberty to alienate the property of the *illam* at her pleasure.⁷ According to custom she can adopt or appoint an heir in order to perpetuate her *illam* in the absence of *dayadies* with ten or three days' pollution.⁸

¹ *Chnechamma v. Subbaya* 9 Mad. 114 (1885).

² *Chinna Obayya v. Sura Reddi* 21 Mad. 226 (1897).

³ *Hanumantamma v. Rani Reddi* 4 Mad. 273 (1880).

⁴ *Sivada Balarami Reddi v. Sivada Pera Reddi*, 6 Mad. 267 (1882).

⁵ *Narasimha Razu v. Veerabhadra Razu*, 17 Mad. 287 (1893).

⁶ *Nambiatan Nambudiri v. Nambiatan Nambudiri*, 2 Mad. H.C.R. 110 (1864).

⁷ *Vasudevan v. The Secretary of State for India*, 11 Mad. 157 (1887).

⁸ *Ibid.*

Under the Hindu law, the father has a share in family property which may be severed by partition and which descends on his death to his sons. The obligation of the sons to discharge the father's debts is incidental to the heritage. For discharge of debts, other than debts incurred for immoral purposes, the interest of the son in the family property may be sold. But among Nambudris, neither the father nor the son has any definite share in family property which may be made available for the father's debt. The property is joint and indivisible and belongs to the whole family. Sons are not liable for a decree against the father. The principle of Hindu law, which imposes a duty on a son to pay his father's debt, contracted for purposes, neither illegal nor immoral, is not applicable to the Nambudris, and Mussads (a class of Nambudris).

Liability of
sons for
father's debts.

Among the Nambudris the rule in respect of devolution of self-acquired property is not quite clear. There is no definite ruling of the High Court on this point. The decision in *Kallati Kunju Menon v. Palat Errocha Menon*¹ has settled the law in so far as Nair *tarwals* are concerned. There the Court said ; "It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property, but they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male." In *Vasudevan v. The Secretary of State for India*,² the learned Judges in discussing certain questions regarding the personal law of Nambudris observed that among them "self-acquired property merges on the death of the person acquiring it in family property as in the case among Nairs." This observation however cannot be looked on as anything more than a mere *obiter dictum*, as no question as to the self-acquisitions of Nambudris was then before the Court.

Self-acqui-
sition.

¹ 2 Mad. H.C.R. 162 (1864).

11 Mal. 157 (1887).

The decision in *A. L. Amma v. P. T. Nambudri*¹ did not advance the matter any further. Their Lordships after referring to *Vasudevan's* case, as mentioned above, went on to observe as follows:—"The course of the decisions being as now set forth, we should certainly not be prepared to hold that it is not open to the appellants to contend that the self-acquisition of Sankaran Nambudri passed on his death to his own immediate heirs and not to his *illam* if this contention had been raised either before the Court of first instance or the lower Appellate Court. From the records, however, it is clear that this plea was never even suggested till this case came before us on second appeal. Such being the case we must refuse to refer this point, as we have been requested to do, to the lower Courts for inquiry and decision."

Tarwad.

A *tarwad* is a body of persons with community of property and the common right of the eldest to succeed to the management of it.² Sir Muttusami Ayyar, the President of the Malabar Marriage Commission of 1891, added a Memorandum to the report of the Commission. We quote from it the following very clear and concise description of a *tarwad*:—"In its simplest form a *tarwad*, or *marumakkatayam* family, consists of a mother and her children living together with the maternal uncle as their *karnavan*. In its complex form it consists of several mothers and their children or their descendants in the female line, all tracing their descent from a common female ancestor, and living together as a joint family, in subjection to the power, and under the guidance and control of the senior male for the time being, as its head or representative. The link of relationship is descent from a common female ancestor, and the bond of family union is subjection to a common *karnavan*. The notion of *tarwad* property is that the entire family is its owner, that it is imitable except by com-

¹ 25 Mad. 662. (1901).

v. *E. Chenen Nayar*, 6 Mad. H.C.R.

² *Erambapalli Korapen Nayar* 411 p. 413 (1871) per Holloway J.

mon consent, and that each individual member is entitled to be maintained in his or her *tarwad* home and to the fruits of joint beneficial enjoyment. The joint family is called a *tarwad* and each of the mothers and her children and descendants in the female line constituting the *tarwad* is called a *taivali*, or the line of a single mother. * * * It is noteworthy that the relation of husband and wife or of father and child is not inherent in the conception of a *marumakkatayam* family. In cases in which a Nair woman resides with her husband, it is still considered to be in accordance with immemorial usage to send her back to her own *tarwad* immediately after, or very shortly after, his death, and not to remove his corpse for cremation until she is first sent away. The person that begot a child on a *marumakkatayam* female was originally regarded as a casual visitor, and the sexual relation depended for its continuance on mutual consent."¹

The senior male member of a *tarwad* is called the *Karnaran*. *karnavan*. He is not a mere trustee but bears the closest resemblance to the father of a Hindu family.² His position, rights and obligations have been the subject of various decisions.³ We quote the following from the judgment in the case of *Varanakot N. Namburi v. V. N. Namburi*⁴ :—“Under Malabar law, the eldest male member of the *tarwad* is the *karnavan*. In him is vested actually (though in theory in the females) all the property, moveable and immoveable, belonging to the *tarwad*. It is his right and duty to manage alone the property of the *tarwad*, to take care of it, to invest it in his own name (if it be moveable) either on loans on *kanom*⁵ or other security, or by purchasing in his own name lands, and to

¹ The above is quoted in *Thiruthipalli Raman Menon v. Ittaup Revicarman*, 1 Mad. 153 (1876).

² See Norton's Leading Cases, *Varinngattil Palisseri Raman Menon*, 24 Mad. 73 p. 76 (P.C.) [1900]: s.c. 27 I.A. 231.

³ *Eraanni Revicarman v. Ittaup Revicarman*, 1 pp. 210-212.

⁴ 2 Mad. 328 p. 230 (1880).

⁵ Sort of a usufructuary mortgage.

receive the rents of lands. He can also grant the land on *kaum* by his own act or on *otti* mortgage. He is not accountable to any member of the *tarwad* in respect of the income of it, nor can a suit be maintained for an account of the *tarwad* property in the absence of fraud on his part. He is entitled in his own name to sue for the purpose of recovering or protecting property of the *tarwad*. None of his acts in relation to the above matters can be legally questioned by the *tarwad* if he has acted *bona fide*. If any of his acts have been done *mala fide* they can be questioned by the members of the *tarwad*, and he may be removed for *mala fides* in his acts, or for incompetency to manage and other causes. He is interested in the property of the *tarwad*, as a member of it, to the same extent as each of the other members. All the members, including the *karnavan*, are entitled to maintenance out of the *tarwad* property. His management may not be as prudent or beneficial as that of another manager would be, but, unless he acts *mala fide*, or with recklessness or utter incompetency, he cannot be removed from such management. Almost the only restraint on him in such management is that he cannot alienate the lands of the *tarwad* except with the assent of the senior *anandavan*, or, in certain circumstances, of others of the *anandavan*.

"In theory, no doubt, property is, according to Malabar usage and law, derived through and from the female members, and, in this view, all the rest of the *tarwad* claim under them. But in practice the property is acquired and possessed by, and in the name of, the *karnavan* for the time being by his own independent act. All the other members claim through him and are bound by his acts (save as to alienations as above explained").

His powers.

Though a *karnavan* seems to possess large powers in respect of a *tarwad*, these powers are essentially limited to its management. He cannot apparently alienate the family property without the consent of the other members of the family (*anandavans*), although an unreasonable

and wrong headed opposition may probably be overruled.¹ The ordinary powers of a *karnavan* can be restricted by a family agreement to which he is a party, and if, in breach of such agreement, the *karnavan* makes an alienation to a stranger who has notice of the agreement, the *tarwad* is not bound by the alienation.² A decree in a suit, in which the *karnavan* of a Nambudri *illam* or a *marumakkatayam tarwad* is, in his representative capacity, joined as a defendant, and which he honestly defends, is binding on the other members of the family not actually made parties.³ A *karnavan* singly may create an *otti* mortgage for proper reasons and raise money for the family.⁴

As a *karnavan* is not a mere trustee, the rules of Courts of Equity as to the necessity of making *cestui que* trusts, parties to suits against trustees by strangers do not apply to the case of a *karnavan* and the members of the *tarwad*.⁵ As the members of a *tarwad* claim under a *karnavan* they sue as such within the meaning of Explanation 5 of section 13 C. P. C. (old Act). A decree against a *karnavan* of a Malabar *tarwad*, as such, is binding upon the members of that *tarwad*, though they may not be parties to the suit, in the absence of fraud or collusion.⁶

It is open to a *karnavan* of a *tarwad* to renounce his right to manage the *tarwad* affairs.⁷ Though he has the power, unless specially limited by family usage or agreement, to himself manage the trust property of the *tarwad*, he has no inherent right, as *karnavan*, to appoint another to take his place as such trustee.⁸ If he appoints a junior *anandravan* as his agent to manage part of the *tarwad*

¹ *Vide* 24 Mad. 73 p. 80.

² *V. N. Numburi v. V. N. Numburi*, 2 Mad. 328 (1880).

³ *Kanna Pisharodi v. Kombi Achen*, 8 Mad. 381 (1885).

⁴ *Ibid.* See also *Subramanyan v. Gopala*, 10 Mad. 223 (1886).

⁵ *Vusnderan v. Sankaram*, 20 Mad. 129 (P.B.) [1896].

⁶ *K. P. V. Tarazhi v. Narayanan*, 28 Mad. 182 (1904).

⁷ *Edathi Itti v. Kopashon Nayar*, 1 Mad. H. C. R. 122 (1862).

⁸ *Kannan v. Pazhaniandi*, 24 Mad. 438 (1901).

property, collect rents, &c., he can, on behalf of the *tarwad* family, revoke this authority at any time and take the management into his own hands.¹ An individual member of a *tarwad* has no right to claim an account from the *karnavan*.²

A Court has no power to confer on *karnavan* larger powers than those sanctioned by usage. If such powers are insufficient to secure to *tarwads* the full enjoyment of their estates, or if they are so limited as to interpose obstacles to the establishment of new industries the extension of such powers must be sought from the Legislature.³

Each member of a *tarwad* has a right to succeed by seniority to the management of the family property.⁴ On the extinction of a particular house, the *tarwad* property goes over to other houses traditionally connected but long severed in point of rights of property⁵.

Adoption by
a karnavan.

In Strange's Manual of Hindu Law the following passage occurs, relating to adoption by a *karnavan* :—"On failure of the sister's progeny male and female, the head of the family may make adoption. The descent being to the female line, the adoption must be of a female."⁶ This right to adopt a female is in accordance with the Nair custom and is vested in the *karnavan* or head of the family. His power to adopt, so as to make the adopted and their heirs members of the *tarwad*, is limited to the extent that, the adoption must be made with the consent of other members of the *tarwad*. Where the elder of two brothers, the only surviving members of a *tarwad*, adopted, in his capacity of *karnavan*, four persons to be joint members thereof without the consent of the younger brother, it

¹ *Gorindan v. Kannaran*, 1 Mad. 351 (1878).

⁴ *Kunigaratu v. Arrangaden* 2 Mad. H. C. R. 12 (1864).

² *Kunigaratu v. Arrungaden* 2 Mad. H. C. R. 12 ((1864)).

⁵ Vide *E. K. Nayar v. E. Ch. Nayar*, 6 Mad. H. C. R. 411 p. 413.

³ *P. P. K. Hajee v. P. P. K. Hajee*, 3 Mad. 169 (1881).

⁶ *per Holloway J.*

⁶ Vide Section 403 *Idem*.

was held by the Privy Council that he, the *karnaran*, could not do so, in the absence of a proved custom authorizing such adoption by the *karnaran* alone. Their Lordships said : "such a power may be essential to the preservation of the *tarwad* when the last possible *karnavan* has been reached, but the possession of such a power by any *karnavan* who is not the last surviving head of his *tarwad*, seems to their Lordships to be unnecessary and to be unjust to those members of the family who may survive him and become *karnavans* in their turn. In the absence of proof it would be contrary to sound legal principles to hold that any such power was conferred by any alleged custom."¹

A female is not precluded from managing the affairs of her *tarwad* when there is no male member in her family capable of performing the duties of a *karnavan*.²

A female
karnaran.

We have already said that the position of a *karnaran* is like that of the father of a Hindu family. Like him, his situation as head of the family comes to him by birth. He should certainly not be removed from his situation except on the most cogent grounds. The office is not one conferred by trust or contract, but is the offspring of his natural condition.³ In considering the question of removing a *karnavan*, the principal point to be remembered is whether such removal will benefit the family. Merely that he is unworthy of the position is not enough. It must be satisfactorily shown that his conduct is such that he cannot be retained in his position without serious risk to the interests of the family. In *Eravanni Revivarman v. Ittappu Revivarman* the learned Judges concluded their judgment with these very significant words :—"The state of families and property in Malabar will always create difficulties. Their solution will not be assisted by bringing in the anarchy and insecurity which

Removal of a
karnaran.

¹ *T. R. Menon v. V. P. R. Menon* Mad. 223 (1886).

² 21 Mad. 73 (P.C.) 1900 : s. c 27 . ³ *Eravanni Revivarman v. Itta-pu Revivarman*, 1 Mad. 153 p. 157 I. A. 231 : s. c. 4 C.W.N. 810

* *Subramanyan v. Gopala*, 10 (1876).

will always follow upon any attempt to weaken the natural authority of the *karnavan*.¹ Where a *karnavan* was found to have made perpetual grants of certain lands belonging to his *tarwad* for other than family purposes, and to have made demises of certain other lands belonging to his *tarwad* for unusual periods on no justifiable grounds, it was held that that did not constitute sufficient ground for removal of the *karnavan* from his office, his conduct not having been such as to show that he could not be retained in the position without serious risk to the interests of the family.² The grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of the *tarwad* were persistently disregarded, was held to be sufficient ground for removing a *karnavan* from the management of the *tarwad* property.³

Anandraran's right to maintenance.

Junior male members of a *tarwad* are called *anandravans*, and are entitled to maintenance. Their right to maintenance is merely a right to be maintained in the family house.⁴ In North Malabar they are entitled to receive from the *karnavan* an allowance for the maintenance of their consorts and children in the *tarwad* house.⁵ Though the general rule is that an *anandravan* cannot have separate maintenance, there may be rare exceptions. As for instance where the *karnavan* has been the cause of quarrels which necessitated an *anandravan* leaving the family house.⁶ The fact that a member of a Malabar *tarwad* has private means does not affect his right to subsistence where the income of the *tarwad* is sufficient to provide for all a suitable maintenance; but when the income is insufficient the *karnavan* must take into consideration the private means of each of the others.⁷ A *karnavan*, as a

¹ Mad. 153 p. 158.

² Ibid.

³ P. P. K. Hajee v. P. P. K.

Hajee, 3 Mad. 169 (1881), approving 1 Mad. 153.

⁴ Kunigaratu v. Arrangaden, 2 Mad. H. C. R. 12 (1864).

⁵ V.V.V. Parrathi v. V.V.V.

Kamaran Nayar 6 Mad. 341

(1882).

⁶ Peru Nayar v. Ayyappan

Nayar 2 Mad. 282 (1880).

⁷ E. T. K. Ama v. E. S. V.

Kymal 5 Mad. 71 (1887).

senior member, enjoys special consideration in the *tarwad* family, but has no higher claim in the enjoyment of the income than any other member of the family. The practice of awarding one moiety of the net income of the *tarwad* to the *karnavan* is not authorized by law.¹

A gift of property to a female and to some or all of her children by their father, or the *karnavan* of the *tarwad*, has not the effect of constituting them into a *tarwad* by themselves. They, however, hold the properties so given with the ordinary incidents of *tarwad* property, and when a member dies, his interest passes by survivorship to the others and is not available for attachment at the instance of a decree-holder.² Property assigned by the males of a Nair family for the support of their females is still family property and liable as such to be taken in execution of a judgment against the *karnavan*.³

A *tarwad* is inalienable, unless there be a pressing family necessity and that be well established. The assent of the senior *anandravan* to the alienation is some evidence that the purpose was a proper one, though that is open to rebuttal.⁴ There is no rule of Malabar law that makes the assent of every member of a *tarwad* necessary to render valid the alienation of *tarwad* property.⁵ When the deed of sale is signed by the *karnavan* and the senior *anandravan*, if *sui juris*, the sale of the property is valid. Such signature is *prima facie* evidence of the assent of the family, and the burden of proving their dissent rests on those who allege it.⁶

Effect of gift
of property to
a female and
her children.

Alienation of
a *tarwad*.

¹ *Narayani v. Govinda* 7 Mad. 352 (1884).

² *Koroth Amman Kutti v. Perungottil Appu Nambiar* 29 Mad. 322 (1906).

³ *Parahel Kondi Menon v. Vada-kentil Kunni Penna* 2 Mad. H.C.R. 41 (1864).

⁴ *Koyilothputenpurayil v. Puthenpurayal*, 3 Mad. H.C.R. 294

(1867); *Edathil Itti v. Kopashon Nayar*, 1 Mad. H. C. R. 123 (1862); see also Wigram's Malabar Law and Customs p. 52.

⁵ *Kalligani v. Narayana* 9 Mad. 266 (1885).

⁶ *Kondi Menon v. Sranginreugatta Ahammada* 1 Mad. H.C.R. 248 (1862).

Office of
karnam.
eligibility of
females.

In *Alymalammal v. Venkataramayyan*¹ it has been held that women are not entitled to succeed to the office of *karnam* though they have been, and sometimes are, allowed to fill the office nominally. Their sex has been regarded as incapacitating them from the office.² The office of *karnam* is hereditary and cannot be transferred by a deed of gift, for a *karnam* cannot confer the office upon another without assuming the authority of the proprietor of the district or the ruling power, and without doing injury to his posterity.³

Taverai.

The word *taverai* literally means children of the same mother, but has several distinct meanings in Malabar. In its secondary sense the term refers to a branch of the family having separate possession of a portion of the family property for convenience of enjoyment without prejudice to the unity, *tarwad* interest, or to the general control of the *tarwad karnavan*. The term includes also a branch holding self-acquired property. If the *tarwad* is broken up by partition made by common consent each branch is called a new or branch *tarwad*, and the divided kinsmen are called *attaladakkan*, or reversionary heirs.⁴

Families becoming very numerous have often split into various branches and have, in fact, become new families. In the language of the people "there is community of purity and impurity between them, but no community of property." In one sense of the word people so related are still of the same *tarwad*; in the only sense with which Courts of Justice are concerned, people so related are not of the same *tarwad*. Where there are several houses bearing the same original name, but with an addition, and there is no evi-

¹ Mad. Decis. p. 85 (1844).

² See also *Venkataratnamma v. Ramanujasami* 2 Mad. 312 (1880); *Chandroma v. Venkatraju* 10 Mad. 226 (1887).

³ *Diggavelly Parummah v.*

Coontamookala Surrauze. (Case 1 of 1819) 1 Mad. Decis. 214 : s.c.

Morley's Digest Vol. I. p. 397.

⁴ *Vide Sir Muttusami Ayyar's Memorandum to Malabar Marriage Commission of 1891.*

dence of the passing of a member of one house to another; there is the strongest ground for concluding that separation has taken place.¹

In the families of the Princes, all the houses have separate property and the senior in age of all the houses succeeds to the royalty with the property specially devoted to it. This mode of succession may be regarded as rather due to public than to private law. Private families have sometimes adopted the same customs, but there is the strongest presumption against the truth of this in the case of a private family.²

Where an attempt is made to set up a family rule and more specially by contract, excluding the *karnavan* from all management of the property, although the senior of the houses invariably becomes *karnavan*, such an attempt can scarcely succeed. The presumption of the unity and of the existence of the ordinary rule is too strong.³ A member of a *tarwad* divided into *taverais* with separate dwelling houses may claim to be maintained by the *karnavan* in the house of the *taverai* to which he or she belongs.⁴

As we have already said Tiyans and Tiyars of South Malabar, and Thiyyas of Calicut, like Nambudris, follow the *Makkatayam* rule of inheritance. They must not be taken to be governed by the Hindu law pure and simple. Their usages with regard to divorce, re-marriage and inheritance are not entirely in accordance with the Hindu law, though the succession of sons obtains among them. A brother succeeds to the self-acquired property of his deceased brother in preference to the widow of the latter.⁵ Among Tiyans, compulsory partition cannot be effected at

Tiyans,
Tiyars, &c.

¹ *E. K. Nayar v. E Ch. Nayar*
6 Mad. H.C.R. 411 (1871).

⁴ *Ch. K. N. Paravadi v. Ch.*
Ch. Nambiar 4 Mad. 169 (1881).

² *Ibid.*

⁵ *Rarichan v. Perachi*, 15 Mad.
281 (1892).

³ *Ibid.*

the will of one member of the *tarwad*.¹ On the death of a Tiyan of South Malabar, his mother, widow and daughter are entitled to succeed to his property (acquired by himself and his father) in preference to his father's divided brothers.² Among the Thiyyas of Calicut the widow of a deceased owner is a preferential heir to his mother.³ Iluvans of the Palghat taluq also follow the *Makkatayam* law of inheritance. In their community partition is almost of universal prevalence. It is compulsory rather than dependent on mutual consent. The Iluvans have long separated themselves from the Tiyanas and treated themselves as a separate class. Consequently the ruling in *Raman Menon v. Chathunni*⁴ cannot be taken to govern them as to partibility, even assuming that at one time Iluvans and Tiyanas were of one class.⁵

Zamorins of
Calicut.

Regarding the customs of the Zamorins of Calicut we take the following from *Vira Rayen v. The Valia Rani*,⁶ and *Puttia Kovilakath Krishnan Raja Avergal v. Puttia Kovilakuth Sridevi*.⁷ The family of the Tamuri Rajahs or Zamorins of Calicut comprises three *kovilakams* or houses—the *pudia*, *padinjara* and *keyake* kovilakams. The Zamorins are governed by the *Marumakkatayam* law of inheritance. Each kovilakam has its separate estate and the senior lady of each, known as the *valia thamburatti*, is entitled to the management of the property belonging to it. There are also five *sthanoms*, or places of dignity, with separate properties attached to them, which are enjoyed in succession by the senior male members of the kovilakams. These are in order of dignity (1) the *Zamorin*, (2) the *Eralpad*,

- ¹ *Raman Menon v. Chathunni*, 17 Mad. 184 (1893).
² 17 Mad. 184 (1893).
³ *Velu v. Chamu* 22 Mad. 297
⁴ *Imbichi Kandan v. Imbichi* (1898).
⁵ *Pennu* 19 Mad. 1 (1895).
⁶ 3 Mad. 141 (1881).
⁷ *Kunhi Pennu v. Chiruda* 19 12 Mad. 512 (P.C.) [1889].
⁸ Mad. 440 (1896).

(3) the *Munarpad*, (4) the *Edatharapad* and (5) the *Nadutharpad*. It would seem that, at the beginning of the nineteenth century, there was also a sixth *sthānom*, known as the *Ellearadi Tirumapad*.

"In the management of the properties of the three kovilakams, the senior ladies are often assisted by the males or rajahs who in time may pass out of the kovilakam and attain one of the separate *sthānoms*.

"There are no family names and the *sthānom*-holders are distinguished after their deaths by the name of the year in which they respectively died. All property acquired by the holder of a *sthānom*, which he has not disposed of in his lifetime, or shown an intention to merge in the property attached to the *sthānom*, becomes, on his death, the property of the kovilakam in which he was born. The property acquired by any member of the kovilakam is, in accordance with the principle recognized in the case of the joint Hindu family, presumed to be the common property of the kovilakam, unless proof is given that it has been acquired otherwise than with the aid of the common funds; and as in other Malabar families, properties are sometimes entrusted to the possession of a member, who is not by the customary law entitled to their management, either for the purposes of management or as an assignment for maintenance. Such arrangements are made at the pleasure of the *valia thamburatti* of the kavilakam, who can also at her pleasure resume any properties which have been so dealt with. Lastly, it is not an uncommon practice that sale-deeds for properties purchased by the kavilakam should be taken in the name not of any member of the kovilakam, but of the deity under whose protection the kovilakam has assumed to place itself, or in the name of agents of the kovilakam. The explanation offered of this circumstance is that formerly ladies were averse to obtaining deeds of sale in their own names, lest it should be supposed they had acquired the funds wherewith to make the purchases by dishonourable means; and with

respect to purchases in the name of the tutelary deity, a more probable reason is suggested that religious scruples would interpose additional reasons for preserving it in the *tarwad*."

In *Vira Rayen v. The Valia Rani*¹ it was held that, according to the custom obtaining in the family of the Zamorin Rajahs of Calicut, property acquired by a *sthanom*-holder and not merged by him in the property of his *sthanom*, or otherwise disposed of by him in his lifetime, becomes on his death the property of the kavilakam in which he was born, and, if found in the possession of a member of the kavilakam, it belongs presumably to the kavilakam as common property.

Sthanom lands, whether alienable.

Lands attached to the *sthanom* of *sthanomdars* in Malabar are, unless the contrary be specifically proved in any particular case, liable to alienation and charge, at all events for the payment of debts incurred for the conservation of the *sthanom*. Holloway J., said :—"In the case of the Zamorin there are decisions that the property of his house is held on terms different to those of others. In his case, however, it has never been decided that the property attached to his *sthanom* is not liable for debts incurred for its conservation. He stands in a peculiar position, and, as has been before pointed out, there is strongest presumption against any other family having a right to claim exception from the general law of the Courts."²

Alyasantana.

The term *Alyasantana* is composed of two words of two different dialects, viz., *alya*, which is Karnatic, meaning son-in-law, and *santana*, which is Sanskrit, meaning offspring. It is applied to the system of rules prevailing in Canara, regulating succession, which invariably runs in the female line as in Malabar. The system is stated to have been introduced into Canara about the beginning of

¹ 3 Mad. 141 (1881).

1 Mad. 88 (1876).

² *Ch. M. Nair v. K. U. Memon,*

the thirteenth century.¹ According to Mr. Mayne, it is said to have been introduced into South Canara by Bhutala Pandya in 77 A.D.² The difference between the system of *Alyasantana* and the system known as *Marumakatayam*, prevailing in Malabar, lies in the fact that in the former the doctrine that *all rights to property are derived from females* is more completely and consistently carried out than in the latter. Another point of difference is that in Canara the management of property vests generally in females whereas, in Malabar, the management of a *tarwad* is commonly held by males. Besides these points of difference the two systems governing inheritance prevailing in Malabar and Canara are similar.³

"There is some support," said Turner C.J., "for the contention that the *Alyasantana* was not the original law of the Hindus in Canara, and although, if it were borrowed from the South, it may in many features resemble Malabar law, it is not to be assumed that they are on all points identical."⁴ There is so little extant in the form of text or decision on the *Alyasantana* system that the Courts have frequently to rely on prevailing custom and local usages in determining many doubtful questions of right.⁵ But in justice to the school of *Alyasantana*, we should mention that the treatise known as "Bhutala Pandya's Law" is admittedly the best existing authority on the *Alyasantana* system prevailing in Canara, and has again and again been recognized as such by the Courts.⁶

¹ Strange's Hindu Law, 2nd Edn. § 404; Chamier's Land Assessment and Landed Tenures in Canara Mangalore, pp. 16, 86, (1853).

² Hindu Law and Usage, p. 121.

³ *Munda Chetti v. Timmaju Hensu* 1 Mad. H. C. R. 380 p. 383 (1863). Strange's Hindu Law, 2nd

Edn. § 404.

⁴ *Antamma v. Kaveri*, 7 Mad. 575 p. 577 (1884).

⁵ *Subbu Hegadi v. Tongu*, 4 Mad. H. C. R. 196, p. 200 (1869); 7 Mad. 575 (1884).

⁶ *Koraga* 6 Mad. 374 p. 376 (1883).

Compulsory division of property not allowed.

In Canara, as we have already said, females in preference to males are recognized as the proprietors of the family estate. In the families in Canara, in which inheritance is governed by the *Alyasantana* rules, no member of the family can claim compulsory division of the family property.¹

Pattam or office of dignity is indivisible.

The *pattam*, or office of dignity in a family governed by the *Alyasantana* system, is indivisible, and whether the family be divided or not, the *pattam*, no special arrangement having been made about it, descends to the eldest male of the surviving members of the family.²

Marriage under *Alyasantana*.

The marriage relations of the ordinary *Alyasantana* castes of Canara are dealt with in the first eight of the sixteen *kutalis* or rules, subject to the leading *Alyasantana* principle of succession in the female line under which a wife and her children have no share in the inheritance of the husband's property.³ The customary cohabitation of the sexes seems to do no more than create a casual relation, which the woman may terminate at her pleasure, subject, perhaps, to certain conventional restraints among the more respectable classes, such as a money payment and the control of relations, etc., which may be prescribed as a check upon capricious conduct.⁴ The cohabitation of a man and woman under the *Alyasantana* law does not constitute such a marriage as is intended in those sections of the Indian Penal Code which deal with offences against marriage. That the *Alyasantana* law does not recognize such cohabitation as marriage appears from the circumstance that it implies no rights of property or of inheritance.⁵

¹ *Munda Chetti v. Timmaju Hensu*, 1 Mad. H. C. R. 380 (1863).

² *Timmappu Heggade v. Mahalinga Heggade*, 4 Mad. H. C. R. 28 (1868). See also a passage translated from Bhutala Pandya's work and quoted in *Ibid.* p. 30, which

questions the correctness of the same quoted in 1 Mad. H. C. R. 381 note.

³ *Koraga* 6 Mad. p. 374, p. 376 (1883).

⁴ *Ibid.*

⁵ *Ibid.*

A female who is a member of a family governed by the *Alyasantana* system of law, living apart from the family with her husband, is not entitled to a separate maintenance out of the income of the family property.¹

The question whether according to the *Alyasantana* usage obtaining in South Canara, it is the senior male or female, or only the senior female that is entitled to be the *yajamana* of the family was the subject-matter of decision in the case of *Devu v. Deyi*.² The Court, after considering all the judicial decisions and authoritative writings on the point, came to the conclusion that the question was still *res integra* and it was impossible to come to a satisfactory conclusion regarding it without evidence of usage. Where, by a family arrangement between all the members of an *Alyasantana* family in settlement of disputes in the family, it was agreed that the senior male for his life should enjoy the possession of the family land and protect the females, the senior female, assuming that she was *de jure* *yajamana*, could not ordinarily revoke this arrangement.³

In the case of *Mahalinga v. Mariyamma* the Court observed thus:—"Though it was considered not yet settled whether the senior female might not exclude the senior member of the family from management if he is a male, still it was never doubted that the senior member, if a female, is entitled to the *yajamanaship*. It is true that females are generally excluded from management in Malabar by reason of their sex, but it is the incident of a special usage which has been recognized to obtain in that district. As observed by the Judge, the *Alyasantana* system of inheritance as well as the *Marumakkalayam* usage has probably originated from a type of polyandry which prevailed in ancient times, and the natural result of that system would lead to the senior female being the *yajamana* of the

¹ *Subbu Hegadi v. Tongu*, 4 Mad. H. C. R. 196 (1869).

² 8 Mad. 353 (1885).

³ *Ibid.*

family. We agree in the opinion of the Judge that the practice obtaining in Malabar, whereby females are excluded from management, cannot be extended to the *Alyasantana* families in South Canara."¹ The senior female of an *Alyasantana* family is *prima facie* entitled to the *yajamanship*; and, in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the *yajamana* for the time being, and it does not preclude the *yajamana* from resuming the management at his or her pleasure at any time.² It has been held that such a presumption is legal, with reference to a Malabar *tarwad*, the constitution of which is similar to that of an *Alyasantana* family.³

Alyasantana
family : adop-
tion.

The Sudder Court in the case of *Cotay Hegaday v. Manjoo Kumpty*⁴ held that the last female member of an *Alyasantana* family, having a son, cannot without his consent make a valid adoption. In *Chamdu v. Subba*⁵ the question was whether, if the son suffered from ulcerous leprosy, his consent was necessary for the mother to adopt a son in his life-time. It was found that there was no custom in South Canara excluding lepers either from management or from inheritance. Besides, there is no reason why a physical infirmity which unfits a man to be *karnavan* should further deprive him of other rights attached to the *status* which he enjoys in the family. The question is one of *Alyasantana* usage. And in the absence of any authority warranting such adoption, the Court held that the son was entitled to have the adoption set aside.

Self-acquisi-
tion.

According to the custom obtaining in South Canara; the self-acquisition of a member devolves on the heirs of

¹ 12 Mad. 462 p. 464 (1889).

Note; also 12 Mad. 462 p. 464.

² *Makalinga v. Mariyamma* 12 Mad. 462 (1889).

(1889).

³ See *Nambiatan v. Nambiatan* 2 Mad. H C. R. 110, Reporter's

⁴ Mad. Decis. 138 (1859).

⁵ 13 Mad. 209 (1889).

the acquirer in his branch. The *tarwad* has no claim to it.¹ In *Kallati Kunju Menon v. Palat Erracha Menon* the Court observed:—"It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death, form part of the family property, that they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male."² This decision has been uniformly followed by the Courts, and has settled the law in so far as Nair *tarwads* are concerned.³

The self-acquired property of a member of a Malabar *tarwad*, which, not being disposed of at the death of the acquirer, lapses into the property of the *tarwad*, enures as assets of the deceased for the payment of his debts in the hands of the members of the *tarwad*.⁴ A female who is a member of a family governed by the *Alyasantana* system of law, living apart from the family with her husband, is not entitled to a separate allowance for maintenance out of the income of the family property. The husband is bound to maintain his wife out of his self-acquired means so long as she continues to live with him.⁵

The early history of the Mapillas is not accurately known. The term Mapillas, or Maplas, literally means mother's sons.⁶ They are chiefly descendants of Arab settlers and other colonists in Malabar. The designation was conferred on them because they sprang from the intercourse of foreign colonists who were persons unknown. The term was also applied to the descendants of the Nestorian Christians.⁷ But it is now confined to Mahomedans. The Mapillas of the present day are certainly descendants of converts to

Mapillas.

¹ *Antamma v. Kaveri* 7 Mad. 575 (1884).

Kurup 4 Mad. 150 (1881).

² 2 Mad. H.C.R. 162.

Subbu Hegadi v. Tongu 4 Mad. H.C.R. 196 (1869).

³ *Vide* 25 Mad. p. 666 wherein 3 Mad. H.C.R. has been referred to.

⁴ From *ma* mother, and *pilla*, son.

⁵ *Ryrappan Nambiar v. Kelu*

Vide Wilson's Glossary.

Islam from various castes of Hindus in Malabar. It is said that during the sixteenth and seventeenth centuries the Zamorin encouraged their conversion in order to have his war-boats manned by Mapillas to fight the Portuguese on the seas. They have since increased in number and have materially improved their social position.

Although as a rule succession among them is by sons, yet in the Mapilla families residing in North Malabar, the inheritance by nephews is observed. Except in matters of inheritance they are governed by Mahomedan law. Other Mapillas, though professed Moslems, follow either the *Marumakkatayam* or *Makkatayam* system of Malabar. Sometimes both the *Marumakkatayam* system and the Mahomedan law may be followed by a Mapilla *tarwad*. As for instance the former system as governing the descent of the *tarwad* property, and the latter as governing the self-acquisition of the members of the family.¹

Devolution of property.

In North Malabar, if the late owner was governed by the Mahomedan law, the presumption would be that the law governing the devolution of his estate would be the Mahomedan law, notwithstanding that the deceased was, through his mother, interested in *tarwad* property.² In *Assan v. Pathumma*³ the property, the devolution of which was in question, had belonged to a person who was admittedly governed by Mahomedan law. That case should not be understood as laying down that in every dispute relating to property between Mahomedans in North Malabar, even where they are members of a *Marumakkatayam tarwad*, the devolution of property is to be governed by Mahomedan law until the contrary is shown. Where the deceased has followed the *Marumakkatayam* law his self-acquired property passes, on his death, to his *tarwad*.⁴

¹ *Byathamma v. Avulla* 15 Mad. Moithin 27 Mad. 77 (1903).
19 (1891).

² 22 Mad. 494 (1898).

³ *Kunhimbi Umma v. Kandy*

⁴ *Ibid.*

In *Serumah Umah v. Palathan Vitil Marya Coothy Umah*¹ the parties belonged to a Mapilla family and the disputed property was not one the devolution of which was governed by any local law or custom. The Privy Council said that if it was contended that the succession to it was regulated by any special family custom, that custom ought to have been alleged and proved with a distinctness and certainty. And as such proof was not forthcoming their Lordships dismissed the appeal.

Although the Mapillas in Malabar ordinarily follow closely the Hindu custom of holding family property undivided, yet as the Mapillas are not subject to the same personal law as the Hindus their claims cannot be governed by the legal presumption of joint ownership.²

By the custom of the country the junior male members of a Mapilla *tarwad* governed by the *Marumakkatayam* law are entitled to maintenance from the *tarwad* when living in the houses of their consorts and also to a higher rate of maintenance when living with their consorts than when living as single man.³

As to the descent of self-acquired property in a Mapilla family, the Madras High Court's decisions are not uniform. In *Panangatt Unda Pakramar v. Vadakkel Suppi*⁴ the question was raised and it was found that Mapillas are governed in that respect by the ordinary *Marumakkatayam* law as declared in *Kallati Kunja Menon v. Palat Erracha Menon*.⁵ Subsequently in *Kunhi Pathumma v. Mama*⁶ the question was raised again, and after inquiry the finding was in favour of the deviation from *Marumakkatayam* law. The High Court accepted that finding so far as it concerned the particular family and held that there existed sufficient evidence of custom. In *Illika Pakramar v. Kuttii*

Presumption
of joint
ownership.

Anandravan's
maintenance.

Self-acquisi-
tion.

¹ 15 W. R. (P. C.) [1871].

⁴ Second Appeal No. 576 of

² *Ammutti v. Kunji Keyi* 8 Mad 452 (1885).

⁵ 1883, unreported. 2 Mad. H.C.R. 162.

³ *Ch. O. Bappan v. Ch. Ch. O. Makki* 6 Mad. 259 (1882).

⁶ Appeal No. 125 of 1885, unreported.

*Kunhamed*¹ the question was discussed but no definite conclusion was arrived at. In this case, however, the District Judge remanded the case for the trial of the general issue as to the mode of devolution of self-acquired property in *Marumakkatayam* Mapilla families in North Malabar, and ultimately ruled that in *Marumakkatayam* families the self-acquired property of a female descends to her children and does not lapse on her death to her *tarwad*. But the High Court held that the order of remand was not in accordance with section 556 C.P.C. (old Act) and that the proceedings taken under it were irregular.²

Ravuthans of Palghat.

The Ravuthans of Palghat are generally governed by Mahomedan law. In the case of *Mirabivi v. Villayanna*³ a claim by the widow and her daughters for their shares in the estate of the deceased was opposed by other members of the family, who pleaded, *inter alia*, that according to a special custom obtaining among the Ravuthans of that part of the country, adopted from Hindu law, females are excluded from inheritance if sons or sons' sons exist. In two instances it was proved that women of this class had obtained shares under Mahomedan law by suits without this special custom having been even pleaded against them. The High Court held that no valid custom had been established by evidence.

Among Mahomedans of Mabaral.⁴

In a case among Mahomedans of Malabar a nephew claimed to succeed as heir to his deceased uncle's estate in conformity with certain local usages observed chiefly by the Hindus there. But as the nephew failed to prove that such custom prevailed in the family, the estate was adjudged to the sons of the deceased according to the Mahomedan law of inheritance by the Madras Sudder Court.⁵

¹ 17 Mad. 69 (1893).

² 8 Mad. 464 (1885).

³ See *Kunhacha Umma v. Kuttii Mammi Hajee* 16 Mad. 201 (P. B.) [1892].

⁴ Case 5 of 1809, 1 Mad. Decis. 29 : s.c. Morley's Digest Vol. I. p. 346.

In Malabar, when the right to superintend a Mosque is in dispute the Mahomedan law of succession must be applied unless a custom to the contrary is proved. Proof that the management of most mosques in a certain district is in the hands of persons who would inherit under the *Marumakkatayam* law will not warrant a finding of the existence of such a custom in such district.¹

Superintendence of mosques.

Iladarawara mortgage occurs in Kanara and resembles a Welsh mortgage, the mortgagee being in possession and taking the rents and profits in lieu of interest, and the security carrying a right to redeem but none to foreclose. The *iladarawara* mortgagee pays the Government revenue.²

Mortgage tenures :
Iladarawara.

A *Kanom* mortgage is one in which the mortgagee holds the land as security. The mortgagee is entitled to the possession of the property for a period of twelve years from the date of the mortgage. "A *kunom* ... combines in it the ingredients of both a simple usufructuary mortgage. According to the usage of Malabar it is a mortgage with possession for twelve years with a right in the *kanomdar* to appropriate the usufruct in lieu of interest or both principal and interest and the *jenmi* or mortgagor is bound under the contract to pay the *kanom* amount on the expiration of twelve years."³ A *kanom* mortgagee does not forfeit his right to hold for twelve years from the date of the *kanom* by allowing the *porapad* or net rent to fall into arrears.⁴ A *kanomdar's* right to hold for twelve years depends on his acting conformably to usage and the *jenmi's* interest, and is lost if he repudiates the *jenmi's* title and questions the validity of the *kanom*.⁵

¹ *R. Kunhi Biri Sheriff v. Ch. Abdul Aziz* 6 Mad. 103 (1882).

⁴ *Shaikh Rautan v. Kadangot Shupan* 1 Mad. H.C.R. 112 (1862).

² *Mailaraya v. Subbaraya Bhut* 1 Mad H.C.R. 81 note.

⁵ *Mayavanjari Chumaren v. Nimini Mayuran* 2 Mad. H.C.R. 109 (1864). *Ramen Nayar v. Kandapuni Nayar* 1 Mad. H.C.R.

³ *Per Muttusami Ayyar J., in Ramunni v. Brahma Dattan* 15 Mad. 366 p. 369 (1892).

445 (1863).

Although the right to hold for twelve years is inherent in every *kanom* according to the custom of the country, it is competent in the *jenmi* to exclude its operation by express agreement.¹ On the expiry of the term, the *kanom* must either be discharged or renewed.²

The contract of *kanom* is substantially an agreement by one party, on consideration of the receipt of a sum of money from the other, to place real property in possession of that other for a period of twelve years. As the mortgage cannot be discharged before the lapse of twelve years, it seems only consistent with justice that the money should not be reclaimable until that period has elapsed. Where, however, the demisor is unable to give possession, it is reasonable that the demisee should be allowed to repudiate the contract and sue for his money.³

Effect of Anubhavam in a kanom-deed.

A stipulation in a *kanom* deed that a certain amount of grain or money is granted to the mortgagee as *anubhavam* does not necessarily create an irredeemable tenure. The word *anubhavam* will create an irredeemable tenure only when used with reference to the tenure itself, but when used with reference to the allowance, such allowance will be perpetual but not the tenure. Whether, in any particular case, the words create an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided by the language of the document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as *anubhavam*, an irredeemable tenure will be created; but otherwise if the amount of the grant is fixed and the rest is reserved as rent.⁴

Redemption of a kanom.

By the custom of Malabar a *kanom* enures for twelve years unless the parties to it have by express contract

¹ *Shekhara Paniker v. Raru Moidin Kutti v. Udaya Varma Nayar* 2 Mad. 193 (1879). *Valia Rajah* 2 Mad. H. C. R. 315

² *Narayana v. Narayana* 8 (1865). *Vythilingam Pillar v. Kuthi* Mad. 284 (1884).

³ *Vayalil Pudia Modathemmil ravattah Nair* 29 Mad. 501 (1906).

provided for its redemption at an earlier date.¹ Where a first *kanom*-holder in his answer to a redemption suit by a second mortgagee, for the first time denied his own *kanom* and alleged an independent *janmam* right, it was held that he had not thereby forfeited his right to rely upon the option to make a further advance, to which as a *kanom*-holder he was entitled.² In a suit to redeem *kanom*, a *jenmi* has not had to prove "some special exigency" as a condition precedent to his right to recover "on demand" before twelve years.³ On redemption of a *kanom*, the *kanom*-holder is not entitled to claim under the head of improvements the value of trees of spontaneous growth.⁴ The right of a *jenmi* to deduct arrears of rent from the amount payable by him on redemption of a *kanom*, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent.⁵ According to the local usage prevalent in Ernad a *jenmi* on redemption of a *kanom* takes credit for one-half of the value of improvements effected by the *kanomdar*.⁶

A *kuikanom* lease is one in which no term is fixed. In *Kuikanom*. a question whether a *kuikanom* lease is determined on the expiration of twelve years from its date, it was held that "the customary law of Malabar requires that a tenant under a *kanom* or *kuikanom* lease should not be redeemed or ejected until the expiration of twelve years from its date, but it does not determine the lease at the expiration of the twelve years."⁷

¹ *Kelu Nedungadi v. Krishnan Nair* 26 Mad. 727 (F. B.) [1903].

² *Paidal Kidaru v. Parakal Imbichuni Kidaru* 1 Mad. H. C. R. 13 (1862).

³ *Narayana v. Narayana* 8 Mad. 284 (1884).

⁴ 26 Mad. 727 (F.B.); *V.K. Bappoo v. K.A. Ayissa* 14 Mad. 76

dissented from, in which it was held that "Special exigency" must be proved.

⁵ *Unnian v. Rama* 8 Mad. 415 (1884). *Kanna Pisharodi v. Kombi Achen* 8 Mad. 381 (1885).

⁶ *Ibid* 415.

⁷ *Kelappan v. Madhavi*, 25 Mad. 452 (1901).

An *Otti*¹ mortgage in Malabar is what is designated a usufructuary mortgage elsewhere. The *Sudder Adawlut* of Madras described *otti* thus:—"This tenure gives the mortgagee possession and the entire produce of the land, the landlord merely retaining the proprietary title and the power to redeem. When no period has been stipulated the landlord may pay off the mortgage at any time. The principal alone is repayable, the mortgagee recovering the interest of his money from the produce of the land. If the landlord be desirous of raising a further sum and the *otti* mortgagee refuse to advance it, the money may be received from a third party and the mortgage transferred to him. But the original mortgagee has a right to be first consulted."² Some slight modification of the above description has been effected by judicial decisions.

An *otti* mortgage is not an absolute sale. For the *jenmi* proprietor has a distinct right to redeem it. An *otti* right entitles the mortgagee to hold without redemption for twelve years from the date of the mortgage. In other words, an *otti* mortgage is irredeemable before the lapse of twelve years.³ In Malabar it is necessary for a sale of family property that the senior *anandavan* (if *sui juris*) should concur in the conveyance. But as an *otti* mortgage is not a sale, and an *otti* right is a mortgage right, a *karnavan* may singly create it for proper reasons.⁴

Difference
between *otti*
and *kanom*.

An *otti* differs from a *kanom* in two respects. First, the right of pre-emption which the *otti*-holder possesses in case the *jenmi* wishes to sell the premises, and, secondly, in the amount secured, which is generally so large as

¹ Also known as *Palissa Mudakka*, *Vari Madakka Nierpalissa* or *Veppu* in several parts of Malabar.

² See also Wilson's Glossary. Proceedings of the Sudder Adawlut, 5th August, 1855.

³ See Special Appeal No. 101 of

1862, Madras High Court, dated March 21, 1863; *Edathel Itti v. Kopashon Nayar*, 1 Mad. H. C. R. 122 (1862). *Kumini Ama v. Parkam Kulusheri* Ibid 261 (1868); *Keshava v. Keshara* 2 Mad. 45 (1877).

⁴ *Edathil Itti v. Kopashon Nayar* 1 Mad. H.C.R. 122 (1860).

practically to absorb in the payment of the interest the rent that would otherwise have been paid to the *jenmi*, who is thus entitled to a mere pepper-corn rent.¹

An *otti*-holder, like a *kanomdar*, forfeits his right to hold for twelve years by denying the *jenmi*'s title.² But he does not forfeit his right as holder of an *otti* by endeavouring to set up further charges (which he has failed to prove) in answer to a suit for redemption. Nor does he lose his rights by setting up as a plea, that an assignment of the *jenmi*'s title was invalid, because it was made without his consent in writing, or because, in defeasance of his rights of pre-emption, it was made without any previous offer to him.³ An *ottidar* loses his right of pre-emption if he refuses to bid at a court sale of the land comprised in his *otti*, held in execution of a decree against the *karnavan* and senior *anandranavan* of the *tarwad*, in which the *jenmi* right is vested, after having been specially invited to attend and exercise that right, and if he makes no offer to take the property for a long time after the court-sale.⁴

An *otti* mortgagee, if he avails himself of his right of pre-emption, must pay for pre-emption whatever sum is *bona fide* offered to the *jenmi* for the purchase, if the former has the offer made to him by the *jenmi* and is rightly informed of the circumstances in reference to the offer. If he does not pay such sum, then his right of pre-emption is gone and the *jenmi* may sell to another. He is not obliged to give any fancy auction price at an auction but is "entitled to the advantage which his position gives him, to be fully informed what price he is to pay before he makes up his mind to buy." Public notice of, and the option of, bidding at a court-sale of the *jenmi*'s rights do not constitute a valid offer of pre-emption so as to deprive

¹ *Kumini Ama v. Parkam Kulus-heri* 1 Mad. H.C.R. 261 (1863).

Kinathe, 3 Mad. 74 (1880).

² *Kellu Eradi v. Puapalli*, 2 Mad. H. C. R. 161 (1864).

¹ *Ammotti Haji v. Kunhayen Kutti*, 15 Mad. 480 (1892). *Vasudevan v. Kushavan* 7 Mad. 309 (1884).

³ *K. T. P. Kunhalil v. V. V.* (1884).

Otti-holder's right.

the *otti*-holder of his right of pre-emption, if he does not purchase the *jenmi's* rights.¹

*Jenmi's
right.*

During the continuance of a first *otti* mortgage the *jenmi* is in the same position as regards his right to make a second *otti* mortgage to a stranger as he was before, after the lapse of twelve years from the date of the first mortgage. In *Ali Husain v. Nillakanden Nambudri*,² the Court observed:—"It has been frequently decided and is now well settled that an *otti* mortgagee must, if the *jenmi* proprietor is desirous of obtaining a further advance by way of mortgage on the property, be allowed as a matter of right the option of making the advance himself, before the lands can be offered on superior mortgage, and be made a valid security for an advance by a stranger, and no distinction has been made between the rights of the first mortgagee before and after the lapse of the twelve years." So where a *jenmi* made an *otti* mortgage and more than twelve years after made a second *otti* mortgage to a stranger without having given notice to the first mortgagees so as to admit of the exercise of their option to advance the further sum required by the *jenmi*, it was held that the second mortgagee could not redeem the lands comprised in the first mortgage.³

Peruarthum.

A *Peruarthum* tenure is confined to one or two taluqs of Malabar. It is a mortgage "in which the proprietor receives the full marketable value of the property for the time being, retaining the empty title of *jenmi*, (not being entitled to the smallest token of acknowledgment of proprietorship), and in redeeming the property he repays, not the amount originally advanced to him, but the actual

¹ *R. P. I. Ch. K. Nambudri v. R.P. I. V. Nambudri* 5 Mad. 198 (1882). *Kankarankutti v. Uthotti*, 13 Mad. 490 (1890). See also *Krishna Menon v. Kesavan*, 20 Mad. 305 (1897).

² 1 Mad. H. C. R. 356 (1863).

³ *Ibid.* As to the necessity of giving a first *otti* mortgagee the opportunity of making the further advance required by the mortgagor, see S. A. No. 17 of 1860, Mad. Decis. 249 (1860), referred to in 1 Mad. H. C. R. 15, note.

value of it in the market at the time of redemption. If he is to repay only the amount so advanced then he does not pay the *peruarthum*, because that term means full value realizable." In a case in which a *peruarthum* mortgage was the subject for decision, the High Court, on the authority of the Sudder Court's decision, held that on restoration of land under a demise of the kind the market value at the time of redemption, and not the amount originally advanced, should be paid to the tenant.¹

There is no universal usage in Malabar, nor any presumption of its existence that a tenant is not entitled to compensation for improvements effected prior to the date of the *kanom* under which he holds land not specially reserved to him by the *kanom* deed.²

An *Adimayavana* tenure in South Malabar is a permanent one and where land has been granted on it for services rendered prior to the grant, the landlord cannot eject the tenant as long as the land remains in the family of the grantee.³

There is a practice in the Tanjore district by which *purakudis* or artizans are allowed to occupy *manai�ats* belonging to *mirasidars*, free of rent, so long as they cultivate the lands of the *mirasidars* or render them services in other ways.⁴

Land tenure,

Adimaya-vana.

Tanjore custom.

¹ *P. S. V. V. Rajah v. Mangalom Amugur* 1 Mad. 57 (1876).

Calicut 27 Mad. 202 (1903).

² *M. N. Nayar v. V. Nambudri-pad* 4 Mad. 287 (1881).

³ *Lakshmana Padayachi v. Ramanathan Chettiar* 27 Mad. 517 (1897).

⁴ *Theyyan Nair v. Zamorin of*

CHAPTER XII. PUNJAB CUSTOMS.

In no country, throughout British India, is the reign of custom so paramount as in the Punjab. Here, in village communities, among Hindus and Mahomedans, agriculturists and non-agriculturists, customs and usages regulate and determine the civil and municipal rights of the people much more than Statutes and Laws. Decisions by the highest court of the land abound in the recognition of such customs and usages.

The Punjab Civil Code has fully recognized the legal force of custom in all matters of civil right and that it prevails against Hindu law where the latter is shown to have been superseded by it. But customs or usages opposed to morality, public policy or positive law cannot have any such recognition.¹ A family custom in derogation of ordinary law cannot be supported on slender evidence of a few instances of modern date.² To form the basis of a right a custom must be continuous; the right cannot be enforced on the ground of custom alone, when it has been interrupted.³ A local custom, to override the general Hindu law, must be clearly established.⁴

As in other countries, a custom to be valid in the Punjab must satisfy all its requisites, *viz.*, it must be *ancient*, *consistent*, *continuous* and *certain*. On the point of antiquity it should be remembered that the Punjab has been annexed to the British territory in India since 1849. Prior to that period there is little possibility of ascertaining

¹ Vide s. 3; and *Hursahai v. P.R.* (1899).

Bhawani Dass 9 P.R. (1868).

² *Gaman v. Gholam Mahomed*

³ *Jamna Devi v. Chuni Lal* 52 P.R. (1868).

30 P.R. (1903); see also 108 P.R.

⁴ *Doolram v. Bhujjeoram* 33

(1888); 116 P.R. (1893) and 43 P.R. (1866).

what were the customs of the people except by their traditions,—the traditions which have come down from generation to generation. These traditions are to be found recorded in the *Wajib-ul-urz*, *Riwaj-i-am*,—Settlement records and Administration papers of the villages. The statements recorded therein are of considerable value in determining customs. They may not be accepted as proof absolute and conclusive but are invariably regarded as a strong *prima facie* evidence in support of any one of the customs to which they refer. The Chief Court of the Punjab in *Hajja v. Mir Mahomed*¹ laid down that the *Wajib-ul-urz*, where it speaks plainly, must be taken to establish the true custom and rule of property in the village in question, and to signify the consent of the community to be bound by it. It is not final and it is open to any proprietor to prove that he is not bound by it, or did not consent to it. But the presumption is in favour of the document.

We propose to deal with customs relating to Hindus and Mahomedans separately, although in most cases the same custom governs both equally. We begin with customs as obtain among Hindus in the Punjab.

INHERITANCE.

The customary law of succession among many classes of Hindus in the Punjab shows several points of difference from the Hindu law. The principle that the right of inheritance is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor does not hold good among the Hindus of the Punjab. The order of succession among them is regulated by custom and not by spiritual considerations.² “Excepting all matters connected with the property of religious institutions and succession thereto, it may be said that throughout the Punjab there

¹ 54 P.R. (1867).

Law Vol. II. p p. 100, 142.

² Tupper's Punjab Customary

is a tendency towards a separation of civil and religious obligations; and the Courts generally consider traditional rules of custom regarding inheritance without those explanations of a spiritual character which have been applied in other parts of India."¹

With regard to the devolution of property among the people of the Punjab Sir W. H. Rattigan observes as follows:—

"There are four leading canons governing succession to an estate amongst agriculturists. *First*, that male descendants invariably exclude the widow and all other relations; *second*, that when the male line of descendants has died out, it is treated as never having existed, the last male who left descendants being regarded as the propositus; *third*, that a right of representation exists, whereby descendants in different degrees from a common ancestor succeed to the share which their immediate ancestor, if alive, would succeed to; and *fourth*, that females other than the widow or mother of the deceased are usually excluded by near male collaterals, an exception being occasionally allowed in favour of daughters or their issue, chiefly amongst tribes that are strictly endogamous.

"In the case of several sons the ordinary rule is, that they take *per capita* and equally, primogeniture not being recognized except in the case of ruling Chiefs or Jagirdars whose ancestors were ruling chiefs, or in regard to the succession to the post of Lomberdar. But sometimes an eldest son is allowed an extra share, and amongst some tribes the division in the case of sons by different wives is *per stirpes*: these, however, are exceptional cases, and persons who claim a right of this kind must be required to prove that it is recognized by the customary law applicable to them. In a contest between relations of the whole and the half-blood, the decision will largely depend on the rule followed at the distribution of the estate on

the death of the common ancestor, which will give rise to a presumption in favour of the continuance of the rule then adopted."¹

Sons succeed to their deceased father whether the latter was joint with others or not. But a son at the life-time of his father cannot by custom enforce partition of the ancestral immoveable property. This custom is common to Hindus as well as Mahomedans.² Where a father dies leaving sons and daughters surviving him, the sons exclude daughters.³ As a general rule, sons, whether by the same or different wives, share equally.⁴ As in some parts of Bengal, in the Punjab too, sometimes an eldest son is allowed a somewhat larger share than his younger brothers, which is usually known as *huq jethansi* or *jesthansa*. In *Gopal Singh v. Khosal Singh*,⁵ it was held that in the absence of express agreement, the mere fact that in the division of joint ancestral property, the eldest brother received a larger share than his younger brothers, did not operate to deprive him of any share to which he would otherwise be entitled to succeed, on the death of any of his brothers; the presumption being that he received an additional share on account of his being the eldest born, a case sometimes occurring in practice. The rule, however, is that sons share equally in the property of their father; the eldest having no right to a greater share than the rest. *Huq jethansi* also prevails in Oudh in Zemindari villages.⁶ The rule of primogeniture only prevails in families of ruling Chiefs or of Jagirdars whose ancestors were ruling chiefs.⁷

¹ Ratti's Customary Law p. 12.

² 113 P.R. (1886) among Brahmins of Sialkote; 109 P.R. (1888) among Brahmins of Lahore; 1 P.R. (1867) among Mahomedans of Rawulpindi.

³ 113 P.R. (1886); 52 and 109 P.R. (1888).

⁴ See Tupper's Customary Law Vol. II. 138; 101 P.R. (1879).

⁵ 62 P.R. (1868).

⁶ *Manick Chand v. Hira Lal*, 20 Cal. 45, (P.C.) [1892].

⁷ *Vide* The Abstract Principles of Law, Sec. IV, para 17.

Pagvand and
Chundavand.

With regard to the succession of sons of the same father by different mothers, there appears to be two rules prevailing in the Punjab, viz., *Pagvand* and *Chundavand*. According to the former the sons represent units and all share alike. And this seems to be the normal custom in the Punjab regarding the division of paternal property amongst sons. According to the latter, the inheritance is sometimes divided equally between the issue of each wife. If a man left two sons by one wife and one son by another wife, the two sons would receive one half of the property and the one son the other half. This custom of *chundavand* is comparatively rare.¹ Even in those tribes in which the *chundavand* system at one time prevailed, in more recent years the *pagvand* system of division of property has been gradually adopted by them.²

Among Aroras in the Multan district it was found to be the custom that sons by different wives succeed to equal shares according to the *pagvand* rule, and that if one of the sons, having so succeeded dies without male issue, his uterine brothers, or their descendants, are entitled to succeed to the exclusion of half brothers.³ Among Sikh Jats of the Ludhiana district, and also of the Ferozepur district, the *pagvand* rule was found to prevail,⁴ and also amongst the Randhawa Jats in the Gurdaspur district.⁵ The

¹ *Vide* Tupper's Customary Law, Vol. II. p. 202. It is so called in the provincial dialect; in legal phrase, *Patnibhag*. (ਪਤ੍ਰੀ-ਭਾਗ)

² 134 P. R. (1892)

³ *Jhinda Mal v. Wallia Mal*, 855 (1872); 25 P.R. (1873).

⁴ *Dya Singh v. Sujan Singh* 1228 (1871) [Ludhiana]. *Sukha Singh v. Nathu* 340 (1871) [Ferozepur].

⁵ *Bir Singh v. Kairat Singh* 659 (1875). For other instances amongst Sikh Jats and other tribes see 62

of 1868 (Jalandhar Bedis); 1056 of 1877; 34 P. R. 1879 (Jats of Rupar); 1126 of 1880, (Gant Jats); 101 P.R. 1879 and 125 P. R. 1884; (Sindhu Jats of Mogha Tahsil); 172 P. R. 1882 (Mahmars of Ludhiana); 81 P.R. 1884 (Acharjis of Bhawani in Hassar); 127 P.R. 1884 (Sindhu Jats of Jagadri, Ambala); 63 P.R. 1885 (Sindhu Jats of Kot Jograj Gurdaspur); 62 P.R. 1885 (Panda Jats of Gurdaspur); 74 of 1898 (Sindhu Jats of Bagiara Kalan).

chundavand rule prevails amongst the Kolair Jats in the Amritsar district.¹ It was not established that the *chundavand* rule of succession governs Bedis of Chawinda village of the Sialkote district.² In *Natha v. Hurmal*³ it was found that the *chundavand* rule of succession prevailed among Naru Rajputs of Hoshiarpur Tahsil, and that the agnates of the whole-blood had preference over the agnates of the half-blood on the principle laid down in the Full Bench case.⁴ Among Sarai Jats of Dholpur village, Batala Tahsil, in the district of Gurdaspur, the custom of *chundavand* prevails in matters of succession.⁵ Rathis of Palampur are governed by *chundavand* rule in matters of succession.⁶

Custom excludes females and their offspring with varying degrees of strictness. As a rule, daughters and their sons, as well as sisters and their sons, are excluded by near male collaterals. The Hindu law universally allows the right of a daughter to succeed, but there is no shadow of a foundation for the sister's claim in Hindu law. In the absence of male lineal descendants the widow of the deceased ordinarily succeeds to a life estate.⁷ If there are two or more widows they succeed jointly and, on the death of the one, the surviving co-widows take by survivorship.⁸ But where a male descendant of the deceased is alive, the widow is only entitled to a suitable maintenance, whether such descendant is the issue of the surviving widow or of another wife.⁹ Amongst the Singpuria Jagirdars, the widow

Exclusion of
females.

¹ 1160 of 1877; 101 P.R. 1879; 48 P.R. 1886 (Aulakh Jats); 53 *Ibid* (Sanwan Jats); 63 P.R. 1885 (Sindhu Jats); 134 P.R. 1892 (Randhawa Jats of Ajnala); 84 P.R. 1893 (Samrai Jats of Buttala) 119 *Ibid* and 31 P.R. 1894 (Ghumman Jats in Sialkote district.)

² *Bawa Sant Singh v. Ganga Singh* 47 P.R. 1901.

³ 31 P.R. 1903.

⁴ 4 P.R. 1891.

⁵ *Labh Singh v. Narain Singh* 142 P.L.R. (1906).

⁶ *Kundo v. Shib Dial* 17 P.L.R. 1902.

⁷ See, 22, 49 and 89 of 1866; 20 P.R. 1867; 24 and 114 P.R. 1893; 59 P.R. 1894; 20 P.R. 1895.

⁸ See, 128 P.R. 1893.

⁹ See, 11 P.R. 1882; 17 P.R. 1891.

receives for life some portion of her husband's holding in addition to a cash allowance for maintenance.¹ By custom widows of minor Sikh Chiefs in Cis-Sutlej States are excluded from inheritance, e.g., the Sikh Sirdars of Arnauli,² of Lodhran,³ the Mandals of Karnal;⁴ the Ranas of Manaswal in Hoshiarpur.⁵ Amongst Basal Banias of the Jullundar City, a widow is not entitled to succeed to her husband's share in property jointly acquired by him and his brothers.⁶ Among Sikh Jats of Sirsa Tahsil, the son of a widow, by her second husband cannot take the property of the first husband to the exclusion of the male collaterals of the latter.⁷

When a person governed by customary law makes a gift of his property in favour of his wife for her life in lieu of maintenance, in case she has no sons of her own, her step-sons have a vested interest in the property which may be alienated during her life-time.⁸

Widow's estate.

According to the custom of the Singhpooria Jagirdars, a childless widow is entitled to receive for life some portion of her deceased husband's holding, in addition to any cash allowance assigned for her maintenance; she may even succeed for life to the whole of the land, if the quantity be not excessive.⁹

According to the custom of Arians in the village of Faizpur Khund, a widow is entitled to share her husband's estate on a life-tenure with a son by another wife.¹⁰ A similar custom is said to prevail in the Gurgaon and Sirsa District. Village custom generally favours the succession of a widow to her husband's estate for her own life.¹¹ A

¹ 30 P.R. 1868.

² 40 P.R. 1869.

³ 16 P.R. 1890.

⁴ 13 P.R. 1875.

⁵ 52 P.R. 1886.

⁶ 103 P.R. 1891.

⁷ *Kanwar Singh v. Sampuran Singh*, 75 P.R. 1906,

⁸ *Jowala Singh v. Dawarka Das*, 143 P.L.R. 1905.

⁹ *Sirdar Soba Singh v. Attur Kour*, 30 P.R. 1868.

¹⁰ 1131 of 1873.

¹¹ 38 P.R. 1873; 382 of 1868;

¹² 17 P.R. 1902.

local custom did not authorize a widow to dispose of her husband's property, ancestral or acquired.¹ Property acquired by gift from her own relation is her special property.² A mother succeeding to the estate of her deceased son by right of inheritance has only a life-interest.³ A widow cannot alienate except for proved necessity, even where the *Wajib-ul-nuz* permits alienation.⁴ A widow cannot ordinarily claim partition of her deceased husband's share in joint property.⁵ In the case of a widow claiming the power of gift absolutely with the assent of reversioners, the *onus* of proof rests heavily on the person who seeks to maintain such an alienation contrary to the usual custom which restricts the widow's power to alienate to the term of her life-tenure. The fact that certain nearer reversioners have assented to a gift by a widow in favour of a near reversioner does not bar the claim of a reversioner who is equally entitled.⁶

Amongst Bhanant Rajputs of the Garshankar Tahsil, Hoshiarpur district, a widow is allowed to succeed to property left by collaterals of her husband for her life, in the same way as her husband could have succeeded had he been alive when the succession opened out; and this, notwithstanding the fact that she was not in possession of her deceased husband's estate.⁷ Among Mahton Rajputs of Jullundar a widow has a preferential right to succeed to any property of her husband's collaterals, just as her husband would have succeeded thereto, if alive.⁸ Among non-agricultural Brahmans of Karnol a widow is entitled to succeed to the share held by her deceased husband in joint ancestral

¹ 382 of 1868 ; 11 P.R. 1867 ; 954 of 1873.

49 P. R. 1866 ; 40 P. R. 1867.

² *Thakar Singh v. Hira Singh*,

³ 56 P. R. 1870.

47 P. R. 1903.

⁴ 11 P. R. 1870.

⁵ *Anar Devi v. Kanlau* 43 P. R.

⁶ 531 of 1870 ; but see 41 P. R.

1874,

⁷ *Khem Singh v. Biru*, 44 P. R.

⁸ 93 P.R. 1869 ; 28 P. R. 1870 ;

1905.

property.¹ Among Johal Jats of Jograon Talisil of the Ludhiana district, the widow of a sonless proprietor can succeed, on a widow's tenure, to the property of her deceased husband's brother to which her husband could, if he had been alive, when the succession opened, have succeeded.² Among the Girths of Kangra district, a widow is entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded.³ A widow, among Cahehsar of Mouza Chachar in the Shahpur district, can take her husband's estate for life without power to alienate outside Mouza Chachar. By an established custom obtaining in the said Mouza she can alienate the land of her sonless husband to her daughter, if that daughter be married within the village.⁴

Forfeiture of
widow's
estate.

There is no general custom in the Punjab by which a Hindu widow forfeits her husband's estate, when vested in her, by an act of unchastity. In the absence of a proved special custom, where the parties are Hindus, Hindu law applies and according to that law the widow's estate is not forfeited.⁵ But according to a general custom prevalent in agricultural villages a widow holds her husband's estate only so long as she remains chaste, and forfeits it on proof of unchastity.⁶ A widow also forfeits her life interest in her first husband's estate if she remarries.⁷ Amongst certain tribes a re-marriage in the *kuraor* form with the brother of the deceased husband does not cause a forfeiture of the widow's life-estate in the property of her first husband.⁸

¹ *Gokul Chand v. Roja Devi*, *Kurm Kour*, 85 P.R. 1868 (Amritsar); 78 and 92 P.R. 1869; 34 P.R. 1883 P.R. 1905.

² *Saddan v. Khemi* 15 P.R. 1906. See Tupper's Customary Law Vol. II, p. 144; see also

³ *Lahori v. Radho*, 72 P.R. 1906. *Kery Kulitany v. Moniram Kolita*

⁴ *Nawab v. Wallan*, 91 P.R. 1906. 13 B.L.R. 1 : 5 Cal. 776 (F.B.)

⁵ *Atri v. Didar Singh* 76 P.R. 1901, followed 107 P.R. 1888; 5 "and 115 of 1900.

Cal. 776 (P.C.). ⁷ 143, 144 and 145 P.R. 1893; 88

⁶ 677 of 1871; *Ramdhun v.* 1211 of 1876, (Rohtak); 137

⁷ *P. R. 1883, (Sikh Jats of Sirsa):*

Among agricultural tribes in the Ferozepur district, if a widow, up to the time of her husband's death, is living in unchastity in open revolt against him, she is no longer a member of his household, and cannot succeed to the usual widow's interest in his estate after his death.¹ In a suit by reversioners to set aside a sale of property inherited by a widow as made without necessity, it was held that the allegations by the plaintiffs could not be enquired into, that, prior to the date of the sale, the widow had become unchaste and had by custom forfeited her right to the property left by her deceased husband.²

If a person dies leaving no male lineal descendants and if his wife predeceases him, then his mother succeeds to a life-interest, provided she has not re-married.³ The village custom generally recognizes the mother's right of succession in preference to that of the male collaterals or married daughters, except where the latter have lived with the deceased father and their husbands have been treated as *ghar-jamais* or *khana-damads*.⁴ If the mother remarries, then she is excluded by the male collaterals of her son.⁵ The mother is only entitled to a maintenance if her daughter-in-law survives her son.⁶

Mother of
the deceased.

A daughter's right to the ancestral landed property of her father is recognized when there are no male lineal descendants; nor a widow or a mother of the deceased; nor any near male collaterals of the deceased, surviving him. A daughter's son is not recognized as an heir of his maternal grandfather, except in succession to his

Daughters.

¹ 100 P. R. 1891 (Rains of Sirsa); 74 P. R. 1893 (Hinjra Jats of Amritsar).

² *Bholi v. Suttee* 24 P. L. R. 1903.

³ *Bainta v. Achhar* 188 P. L. R. 1905.

⁴ 11 & 37 P. R. 1870; 95 P. R.

1882 (Gujars of Gujrat); 49 P. R. 1883; 135 P. R. 1884 (Gbarbari Gosains of Kangra); 89 P. R. 1886 (Kussuria Pathans).

⁵ See Tribal Law in the Punjab, Chap. II. pp. 59-60.

⁶ 117 P. R. 1888.

⁷ 41 P. R. 1895.

mother. A married daughter sometimes excludes near male collaterals, especially amongst Mahomedan tribes. As, for instance, when she has married a near collateral descended from the same common ancestor as her father; or where she has, with her husband, continuously lived with her father since her marriage, looking after his domestic wants, and assisting him in the management of his estate; or where, being married to a collateral of the father's family, she has been appointed by her father as his heir. In a village community, where a daughter succeeds, either in preference to, or in default of heirs male, to property which, if the descent has been through a son, would be "ancestral," she simply acts as a conduit to pass on the property as ancestral to her sons and their descendants, and does not alter the character of the property simply because she happens to be a female.¹

Exclude
collaterals.

In *Ram v. Lorindi*,² it was held that a childless widowed daughter, inheriting from her father, does not take absolutely, but only for life, with no power of alienation except for necessity. This was agreeably to the custom in the Lahore district and also according to the general Hindu law. In *Rajrub v. Ladh*,³ the Courts found that the daughter (in a family of Brahmans of the Sialkote district) had, agreeably with custom, inherited a house owned and acquired by her father who died leaving a widow and the daughter. The widow having died, the nephews of the deceased owner set up this claim to the house. But the Court held that the daughter, by custom, had inherited. There are other instances where a daughter's claim has been upheld to the exclusion of collaterals.⁴ In *Mari v.*

¹ *Kala Singh v. Buta Singh*, 16 P. R. 1903.

² 40 P. R. 1867.

³ 51 P. R. 1873.

⁴ 38 P. R. 1870 (Jullundar Brahmans); 2 P. R. 1874 (Amballa Jats excluding distant cousins); 73 P.

R. 1879 (Brahmans excluding collaterals in eighth and ninth degree); 143 P. R. 1882 (Khatri's of Lahore excluding brother's son); 172 P. R. 1882, (Mahmars of Ludhiana, daughter's son, excluding collaterals beyond sixth

Jawahra it was held that a daughter was, by custom, entitled to retain her father's estate until her death or marriage as against her distant collaterals.¹ In *Jumna Devi v. Chuni Lal* the contention has not been proved that, by custom among Tewari Brahmans of Amritsar City, a nephew of a childless proprietor excludes his daughter's son in matters of succession to his estate.²

The exclusion of the daughter in favour of collaterals is generally confined to landed property derived from a common ancestor. The rule is not so strictly enforced in regard to a self-acquired property of a deceased father.³ The exclusion is more rigidly observed in tribes which do not practise strict endogamy.⁴

Daughters have been excluded by father's nephews;⁵ by nephews and cousins amongst Dako Brahmans of Rupar;⁶ by collaterals within the fifth degree amongst Mahtums of Hoshiarpur;⁷ by collaterals descended from a great grandfather amongst Manjh Rajputs of Jullundar;⁸ by collaterals amongst Kumbohs of Lahore.⁹ Amongst Brahmans of the Baraker *gotra*, collateral relatives in the eighth or ninth degree are not within the customary limit.¹⁰ By general custom amongst Khatries and Aroras in the Multan Division, a nephew excluded a daughter in succession to a shop and business.¹¹ In the latter case nephews amongst Aroras of Dera Ismail Khan were held to exclude daughters in succession to immoveable property, whether ancestral or

degree); 108 P.R. 1888 (Ath Bans Brahmans of Amritsar, daughter excluding brothers and nephews in succession to acquired property); 67 P.R. 1888, (Khatries of Peshwar, daughters excluding nephew).

P.R. 1893 and 25 P.R. 1895.

⁵ 2 P. R. 1874; 16 P. R. 1877; 150 P. R. 1879.

⁶ 44 P. R. 1879.

⁷ 104 of 1880; 55 P. R. 1881.

⁸ 176 P. R. 1882.

⁹ 40 P. R. 1888.

¹⁰ 73 P. R. 1879.

¹¹ Cir. No. 190, October 16, 1875;

see also 15 P. R. 1884; 148 P. R. 1890.

¹ 12 P. R. 1902.
² 30 P. R. 1908.
³ 77 P.R. 1881; 64 P.R. 1893.
⁴ *Vide* Tupper's Customary Law, Vol. II p.p. 56, 57; Cf. also 73

Exclusion of
daughters.

acquired.¹ Among non-agricultural Aroras of Kasur, in the Lahore district, the daughter is, by custom, excluded by brothers.²

Unmarried daughters.

Unmarried daughters, when excluded from inheritance, must be maintained out of the estate of the deceased father.³ They are sometimes permitted to remain in possession of their father's estate till their marriage.⁴ Amongst Kots, in Jhelum, unmarried motherless daughters succeed to their father for life, so long as they are unmarried.⁵ In *Maul Singh v. Khanu* it was held that under customary law a daughter, entitled to hold the estate of her father till marriage, is competent to alienate it for necessity.⁶

Exclusion of sisters.

The customary exclusion of a sister is established among Jats, both Hindu and Sikh. In this respect the custom agrees with Hindu law. In *Attar Kaur v. Atma Singh*⁷ it was found that by the custom of the Sikh Jats, sisters are not recognized as heirs. There are other instances in which sisters have been excluded by a daughter,⁸ by a half brother,⁹ by collaterals in the fourth degree¹⁰ and by other collaterals.¹¹ But there are exceptions to this custom. Amongst the Bhatti non-agricultural Arains of Lahore and Amitsar sisters are not excluded by brother's sons;¹² nor by a neice amongst Balli Arains of Lahore;¹³ nor by cousins amongst Gholam Arains of Lahore;¹⁴ nor by grandmother's brother amongst Brahmans of Multan;¹⁵ nor by collaterals within the sixth and seventh degrees amongst Gujars of Kharian in Gujarat.¹⁶

¹ See 126 P. R. 1890; 116 P. R. 1893; 55 P. R. 1895.

53 P. R. 1888.

163 P. R. 1890.

² *Anant Ram v. Hukman Mal.* 62 P. R. 1902.

65 P. R. 1892.

71 and 113 P. R. 1892.

³ 50 P. R. 1892 (Hindu Jats of Ludhiana).

25 P. R. 1882.

180 P. R. 1888.

⁴ 139 P. R. 1892.

174 P. R. 1889.

⁵ 56 P. R. 1899.

180 P. R. 1889.

⁶ 90 P. R. 1903.

116 P. R. 1884.

⁷ 47 P. R. 1870.

Among the Brahmans of Gujarat there is no custom prohibiting sisters to succeed along with the sister's sons.¹ Among Bhatias of Bannu, who originally came from Gujarat in the Bombay Presidency, according to a custom prevailing in their community modifying the personal law, sisters succeed their deceased brother's property. A sister thus succeeding to the estate of her deceased brother is entitled to succeed for life or until marriage.²

Whether the sister's son of a deceased Hindu can inherit ancestral land in the presence of remote kindred in the male line, is a question to be determined by the custom of the place to which the parties belong. If the existence of such custom is established he succeeds, although according to the Mitakshara he cannot so inherit. In *Gunput v. Kanah*³ it was found that in the village of Mousapoore, Tahsil Nowashur in the district of Jullundar, a sister's son can inherit the landed property of a deceased aunt in the absence of nearest *juddees* (relations). The recognition of the sister's son as entitled to succeed to the exclusion of distant collaterals has been insisted on in some cases as supported by custom.⁴ Amongst the Brahmans of Multan a sister's grandson succeeds by custom to the estate left by his grandmother's brother.⁵

Among the Ghinths of Tika Bonehr in Kangra district a sister's son succeeds to the estate of the deceased maternal uncles. In *Ballu v. Gur Dyal*,⁶ the plaintiff, as a sister's son, claimed the land owned by his deceased maternal uncle, which mutated after his death in favour of the owners of Tika Bonehr, a heterogenous body consisting of men of various castes. The lower courts dismissed plaintiff's claim on the ground that, under customary law, a sister's son is not recognized as an heir. The Chief Court, however,

¹ 47 P. R. 1890.

¹ See *Ranjee Mal v. Sandagar*

² *Wasna Ram v. Uttam (Devi)*

701 of 1868.

Bai 79 P. R. 1903.

² 180 P. R. 1889.

³ 19 P. R. 1868.

⁴ 95 P. R. 1905.

by reversing their decision held that as the custom obtaining is merely silent and not positively adverse to the plaintiff, as a sister's son, the alternative, under section 5, of the Punjab Laws Act, 1872, is to fall back on the personal law; and under the Mitakshara to which the parties were subject, the plaintiff was an heir, as a *bandhu*, there being no male collateral within the fourteenth degree.

A sister's son is excluded by paternal uncle's son.¹

Daughters-in-law.

In the absence of a custom to the contrary, the widow of a predeceased son is not entitled to inherit, under Hindu law, Mitakshara school, as applicable to the Punjab, property left by her father-in-law in the presence of collaterals related to him in the fourth degree. Nor does she take by survivorship, not being a joint owner with her father-in-law. In *Radha Mal v. Kirpi*² it was held that amongst Khatries of Akalba, in the Ludhiana district, no custom was proved to exist under which a widow of a predeceased son could succeed to the property of her father-in-law.

Special property of females.

Amongst agricultural tribes, a wife's personal property merges in that of the husband.³ A wife cannot dispose of her ornaments which have been made up and given to her by her husband subsequent to marriage in opposition to her husband's wishes.⁴ A husband usually succeeds to his wife's property on her death. But where a husband predeceases his wife, all immoveable property passes to her sons; failing them to the collaterals; and all moveable property goes to daughters. The unmarried daughters take by precedence.

Immoveable property, purchased from the proceeds of moveable property given to the wife by the husband as a present during marriage or from proceeds of her jewellery,

¹ 173 P. R. 1889.

Vol. V. p. 73; Punjab Civil Code s.

² 100 P.R. 1901.

5 cl. (b).

³ *Vide Tupper's Customary Law*

⁴ 81 P. R. 1880.

Vol. II. p. 158; Vol. IV. p. 145;

is the special property of the wife, which she can dispose of at pleasure after her husband's death.¹ But the immovable property purchased by a Hindu widow out of the savings of her income derived from her husband's estate is not her special property; on her death it descends to her husband's heirs.²

By custom a *khana-damad* or resident son-in-law (*ghur-jamai* as he is also called in Bengal and other places) succeeds to his father-in-law's estate in default of male issue. This particular custom of the Punjab is somewhat similar to that of *illatam* in Malabar. But in the Punjab the *khana-damad* or *ghur-jamai* is not thus entitled to exclude ordinary heirs in his own right. The custom has, in reality, inured for the benefit of the daughters and her male issue by reason of her continued residence at her father's place after her marriage. As a matter of fact, where the usage of *khana-damad* is recognized as giving rise to customary rights, it is for the benefit of the daughter's sons; the daughter and her husband only benefit incidentally. In many districts, the right of a *ghur-jamai* depends on the nomination of him by his deceased father-in-law as the heir by a formal writing.³

If a *khana-dumad*, who has succeeded to his father-in-law's estate, dies without sons, the estate used to pass to his heirs and not to those of the father-in-law. This was the rule until the year 1892. A Full Bench in that year laid down the general principle that the property would revert to the original owner's family in all cases where the daughter's direct male descendants had died out.⁴

Illegitimate children are not entitled to any share in their putative father's estate, but they can claim mainten-

*Khana-damad
or ghur-
jamai.*

¹ *Venkata Rama Rau v. Venkata Suriya Rau*, 1 Mad. 281 (1877); S.c. in Privy Council 2 Mad. 333 of 1880; 14 Cal. 886 and *Sowdamini Dassi v. Broughton*, 16 Cal. 574 (1889).

² 58 P.R. 1880; 121 P.R. 1893. * See 919 of 1871 (Ludhiana Jats); 661 of 1879 (Sindhus of Ferozepur); 162 P.R. 1881; 134 and 146 P.R. 1894. * 12 P.R. 1892. (B.B.).

Illegitimate children.

ance only. In a certain case it was found that the illegitimate son (*khwas*) of a high caste Rajput was by custom entitled to maintenance during his life-time, provided he was not guilty of any gross misconduct towards the head of the family; and that the descendants of the illegitimate son had no right to maintenance which entirely depended on the pleasure of the head of the family for the time being.¹

Migrating families.

There are many families in the Punjab who originally came from other places and settled down in the Punjab. The principle governing succession in their cases is determined by how far they have assimilated the customs and usages and manners and habits of their neighbours or retained their own. Certain Sikh Jats of the Amritsar district, who migrated from Rajputana and have for generations lived generally on the profits of agricultural land, though a few of the members thereof had enlisted in the army and were in military service elsewhere, are held to be governed by the customary law of the Punjab and not by Hindu law.² Then again there are some Sikh Brahmans of Mouza Chadwala, in Ambala, who have for several generations abandoned the Brahmanical thread and ceased to perform priestly functions and taken to agriculture in the main. They are governed not by Hindu law but by the agricultural customs which obtained around them.³ Similarly the Brahmans of Manhala village in Lahore, holding lands, are agriculturists pure and simple and are governed by customary law in matters of succession. So an alienation among them by a childless proprietor is governed by custom and not by Hindu law.⁴ Tewari Brahmans of Amritsar City, belonging to a non-agricultural class, migrated from Oudh, and, therefore, are presumed to have retained after immigration the law of their sect in the

¹ 40 P.R. 1880.

⁵⁸ P.R. 1906.

² *Ram Rakha Mal v. Balwant Singh* 51 P.R. 1905.

³ *Moti Ram v. Sant Ram* 103 P.R. 1902.

⁴ *Gopal Singh v. Sukha Singh*

country of their adoption. So where it was alleged that among them by custom a nephew of a childless proprietor excluded his daughter's son in matters of succession and the custom was not proved, the ordinary law took its course.¹

Khatris of Bhagtana Talianwala in Gurdaspur are governed by Hindu law and not by the agricultural custom of their neighbours.² In the absence of proof of special custom Hindu goldsmiths of Umballa City are governed by Hindu law.³ Hindu goldsmiths of Saharanpur, trading at Dagshai, are governed by Hindu law.⁴ Mahrotra Khatris of Multan City are governed by the Hindu law, no custom to the contrary having been proved.⁵

ADOPTION.

Adoption amongst the agriculturists of the village communities in the Punjab is not connected with religion. "It is a more or less public institution by a sonless owner of land of a person to succeed him as his heir." The object is simply to make an heir. Thus, in the olden days it was not unfrequently the case for an old village proprietor without any male issue of his own, to select from amongst his clansmen some promising young man and make him his heir. Consequently, no religious ceremonies are used or necessary.

A widow cannot adopt unless she has an express permission from her husband in his life-time. The sanction of her husband's kindred is not imperative. Where it is asserted that such sanction is customary, it must be proved, for it is not presumed to exist.⁶ Where an adoption by the widow is not authorized by the deceased

¹ *Jomni Devi v. Chuni Lall*, 30 P.R. 1903.

⁴ *Barow v. Makhan* 61 P.R. 1903.

² *Kuka v. Labhchand* 106 P.R. 1906.

⁵ *Wishen Das v. Thakur Das* 119 P.R. 1901

³ *Mangtu v. Chuni Lal* 51 P.R. 1903.

⁶ See 62 P.R. 1888; 198 P.R. 1882.

husband and not made with the consent of the husband's kindred, it only confers on the adopted a right of succession to the widow's own private property which is within her disposing power.¹

Essentials of
a valid
adoption.

The essential requirement for the validity of an adoption is that it should be made *public*. And this can be effected either by a formal declaration before the clansmen, or by a written declaration, or by a long course of treatment "evidencing an unequivocal intention to appoint the specified person as heir".² In a case where the adoptee lived and served the adopter for many years; was separated from his own brothers and had not taken a share of the land left by his natural father; had been treated by the adopter as his son and had performed the funeral obsequies of the adopter on his death: the Court held that under the circumstances the adoption was valid, though there was no ceremony at the time of the adoption.³ In a recent case it was laid down that an unequivocal declaration of *intention*, coupled with previous and subsequent treatment, would be sufficient to prove valid adoption.⁴ Similarly in another case it was held that if no ceremonies are essential and the adoption is not opposed to custom, a *declaration by deed*, when it is coupled with previous and subsequent treatment, is sufficient to establish adoption.⁵ Where the adopter was alleged to have merely executed a deed making the adoptee his heir and reciting an adoption, and the *Riwaz-i-am* mentioned that in the absence of a document certifying the fact of adoption, it was contended that the performance of the marriage ceremony of the adopted should be taken as proof of adoption, and it was held that the *Riwaz-i-am* clearly indicated that any acknowledgment of the relation existing between the adoptive father and

¹ 15 P.R. 1881.

⁴ *Girdhari Lal v. Dalla Mal.* 3

² See 51 P.R. 1881; 79 P.R. 1882; P. R. 1901.

9 P.R. 1898.

⁵ *Sohnun v. Ram Dial* 79 P. R.

³ *Lehna Singh v. Cheina* 111 1901.
P. R. 1868.

son, made in the presence of witnesses, should be looked upon in a similar light.¹

An adoption is not invalidated simply because publicity is not given to the fact, provided it is made in some unequivocal and customary manner.² It is not invalidated either by non-performance of ceremonies³ or for want of sanction of the kindred of the deceased.⁴ There is no restriction as to the age of the person to be adopted.⁵ Unless there is a local custom to the contrary, the adoption of an adult is not invalid, merely by reason of the age of the person adopted.⁶ In fact, the age is immaterial if the adoption is otherwise valid and proper.⁷

As to the persons who may be adopted, it may be said that the degree of relationship of the person to be adopted is no bar to a valid adoption. Even a stranger may be adopted,⁸ and there is no exclusion of an only son,⁹ or of the son of a daughter, or of a sister.¹⁰ The principle that the adopted son of a Hindu, especially among the three superior classes, must not be the son of one whom the adopter could not have married, such as the daughter's or sister's son, is nowhere so superseded by custom as in the Punjab. Amongst Hindu non-agriculturists the adoption of a daughter's or sister's son is a most prevalent practice and the *onus* lies on those who deny that such particular kind of adoption cannot be made.¹¹ But amongst the agriculturists, especially in the eastern districts of the Punjab, such adoption is now getting less frequent. It would seem now that unless such adoption is made with the consent of the agnates, it would be presumed to be invalid.¹² We may

Who may be adopted.

¹ *Buta Singh v. Dial Singh* 67 P. R. 1902.

² 37 P. R. 1868.

³ 92 P. R. 1879.

⁷ *Budh Singh v. Mula Singh* 18 P. L. R. 1905.

⁴ 111 P. R. 1868; 54 & 102 P. R. 1884.

⁸ 3 P. R. 1866.

⁵ 3 P. R. 1860.

⁹ 35 P. R. 1874.

⁶ *Bhuggut Singh v. Boodhoo* 51 P. R. 1867.

¹⁰ 9 P. R. 1868; 24 & 83 P. R. 1867.

¹¹ 79 P. R. 1901.

¹² See 50 P. R. 1893 (F. B.).

mention here in passing that a similar custom of adopting a daughter's or sister's son is sanctioned by custom amongst the Jains, amongst the Brahmans in Southern India and also amongst the Bohra Brahmans in the North-Western Provinces.¹ In the Punjab such custom is prevalent among Brahmans, Khatri, Jats, Aroras, Bhattiyas, and also among Mahomedans, as we shall see later on. There are numerous decisions in support of the custom.²

Besides a daughter's or sister's son, the following persons may be adopted, *niz.*, grand nephew,³ brother's son,⁴ brother's daughter's son,⁵ wife's brother,⁶ wife's brother's son.⁷ We have already noticed that an only son of a father can be adopted; so can the eldest son of a father. Such an adoption is not invalid on that account.⁸ At times village custom requires that the nearest available cognate should be selected for adoption.⁹

Status of adopted son.

The effect of adoption by a Hindu widow, under an authority to adopt, is to render the adopted son heir to the deceased by adoption, and he succeeds to the estate as if he were his natural and legitimate son.¹⁰ Under Customary Law an adopted son does not take an estate in the property of his adoptive father more limited than that which he takes in the property of his natural father, and there is

¹ See Hindu Customs : Adoption.
Supra. pp. 137, 162, 163.

² See, for instance, among—
Brahmans : 1227 of 1874 ; 149 of 1883 ; 79 P. R. 1901.

Khatri : 9 P. R. 1868 ; 64 & 162 of 1883 ; 12 P. R. 1893 ; 24 P. R. 1900 ; 3 P. R. 1901.

Jats : 172 P. R. 1883 ; 34 P. R. 1899 ; 69 P. R. 1905. Exceptions in regard to adoption of a daughter's son.—25 P. R. 1898 ; 18 P. R. 1899 ; 81 P. R. 1900.

Aroras : 35 P. R. 1885.

Bhattiyas : 85 P. R. 1886.

* 96 P. R. 1883.

⁴ 18 P. L.R. 1905.

⁵ 27 P. R. 1884 ; 43 P. R. 1886
51 P. L. R. 1903.

⁶ 125 P. R. 1880 ; 22 P. R. 1891.

⁷ 35 P. R. 1882.

⁸ See, 35 P. R. 1874 ; 43 P. R. 1879 ; 57 P. R. 1881 ; 43 & 75 P. R. 1886. *Exception* 33 P. R. 1872 amongst Gils of Ferozepur.

⁹ See, 79 & 102 P. R. 1893. See also the provisions of *Rivaz-i-am* in 92 P. R. 1894 and 47 P. R. 1895. But see 114 P. R. 1889 and 38 P. R. 1890 *contra*.

¹⁰ *Gopee Ram v. Buldeo Sahai* 91 P. R. 1886.

no distinction between the right to alienate the property acquired in either case.¹ He succeeds to all the rights and interests of his adoptive father on his death.² He only acquires a vested interest in them at the date of his adoption.³ If after his adoption a natural son is born to his adoptive father, the adopted son will share equally with the natural son. On the death of an adopted son, who had succeeded to the estate of his deceased adoptive father, his (adopted son's) male issue succeed, and, in default of such issue, his widow takes his estate on the usual life-interest.⁴ In the event of his dying childless and without leaving any widow, the estate passes to his own natural heirs if the estate consists of property over which his adoptive father had an absolute right of disposal, and to the male collaterals of the adopter's family if the estate consists of property over which his adoptive father had only a restricted power.⁵ Among the Mahtons of the Jullundar district, when an adopted son predeceases his adoptive father, the sons of the former are entitled, on the latter's death, to succeed to his estate by custom.⁶ In accordance with custom a transfer by a sonless father cannot be disputed by his subsequently adopted son.⁷

In *Hursahai v. Bhawani Das*⁸ it was doubted whether an adopted son inherits in his adoptive family collaterally as well as lineally. In this case the parties were Khatris. But in *Makhan Singh v. Dulo*⁹ it was found that among the Chima Jats of the Daska Tahsil, in the district of Sialkote, an adopted son is entitled to succeed to his father's collaterals. Amongst Khatris, in the Umballa

His right to
succeed his
adoptive
father's colla-
terals,

¹ *Futteh Singh v. Nehul Singh* P. R. 1893.

25 P. R. 1901.

² 108 P. R. 1879; 93 P. R. 1893.

³ *Rambhat v. Lakshman* 5 Bom. 630, (1881).

⁴ 9 P. R. 1880.

⁵ 122 P. R. 1879; 9 P. R. 1880; 89 P. R. 1885; 1235 of 1886; 12 P. R. 1892 (F. B); 72

⁶ *Chajju v. Dalipa* 51 P. R. 1906.

⁷ *Ratna v. Golab Singh* 42 P.L. R. 1901.

⁸ 9 P.R. 1868. See also 97 P.R.

⁹ 1879; 14 P. R. 1884; 84 P. R. 1887; 18 P. R. 1889; 107 P. R. 1891.

¹⁰ 4 P.R. 1906.

district, an adopted son succeeds in preference to the nephews of the adopter.¹

In his natural family.

In *Bhuggut Singh v. Boodhoo* it was held that an adopted son cannot inherit from his natural parents.² Among the Jats of Paniput an adopted son is not entitled to succeed to his natural father and take a share in the latter's estate, when there is in existence another natural son and when the adopted son takes by inheritance the entire estate of his adoptive father.³ It would seem from this latest decision that under certain circumstances an adopted son may succeed in his natural family. Regarding his right as against the collaterals of his natural father, the rule is clear and settled, *i.e.*, it is not adversely affected.⁴

Devolution of property on adoptee's death without issue.

Under the general principles of succession to ancestral land in a village community, as laid down in several Full Bench cases, on the death of an adopted son without leaving any male lineal descendants, the estate held by him as an adopted son would not pass to the collateral heirs of his natural family, but would at once revert to his adoptive father and then to the descendants of the latter.⁵ As regards his self-acquired property it must be treated as if the adopted son had never been adopted; because a customary appointment as heir does not take the adopted son out of his natural family for all purposes, and it must therefore go to those who would have been the heirs of the acquirer had he not been adopted, *vis.*, to the members of his father's family.⁶

Can not relinquish his status.

The adoption being absolute and irrevocable an adopted son cannot relinquish his *status*.⁷ He cannot be disinherited

¹ 24 P.R. 1900.

² 51 P.R. 1867.

³ *Mukh Ram v. Nat Ram* 100 P.R. 1906.

⁴ See 47 P.R. 1878; 43 P.R. 1879; 45 P.R. 1884; 42 P.R. 1886; and Tupper's Customary Law Vol. II, p. 157.

⁵ See P.R. 1892 (F.B.); [12] P.R. 1892 (F.B.); F. 58 P.L.R. 1901 D.; *Gurditta v. Attar Singh* 117 P.R. 1906.

⁶ *Punjab Singh v. Khazan Singh* 88 P.R. 1906.

⁷ 17 P.R. 1878; *Narain Das v. Munshi Shamji* 1 P.L.B. 1906.

for mere misconduct or disobedience or neglect to support his adoptive father; nor can the latter subsequently revoke or repudiate the adoption once lawfully made.¹ In *Kanhaya Lal v. Nand Kishore* it was held that there is no valid custom under which a Kayasth of Rhotak can set aside adoption once made.²

ALIENATION.

In the Punjab the property that can be alienated by custom includes both ancestral and self-acquired property, immoveable as well as moveable. An owner of a self-acquired property, moveable or immoveable, has an absolute power of disposal of the same in any way he pleases.³ Sons at times can, by custom, restrain the absolute power of alienation of the self-acquired property of their father.⁴ By custom amongst Brahmans of Bupka, Tahsil Jagadri, a gift of immoveable acquired property to a daughter in the presence of collaterals is not permissible and such a gift will therefore be invalid.⁵ A similar custom prevails amongst Puriwal Jats in Sialkote.⁶ Under Customary Law, property acquired by the income of ancestral property is not regarded as ancestral property.⁷

An ancestral immoveable property is ordinarily inalienable. It can only be alienated by necessity, or with the consent of male descendants, or, in the case of a sonless proprietor, of his male collaterals. The inalienability is strictly maintained amongst Jats residing in the central districts of the Punjab. There is a body of decisions on the point and we only mention here one or two of the

¹ 15 P.R. 1877 ; 17 P.R. 1878 ;
98 P.R. 1882 ; 9 P.R. 1893 ; 143
P.R. 1894.

² 2 P.R. 1877 ; 17 P.R. 1886.

³ 24 P.R. 1892.

⁴ 17 P.R. 1893.

⁵ 7 P.L.R. 1901.

⁶ 3. P.L.R. 1901 ; 4 P.R. 1900 ;

⁷ 70 P.R. 1876 ; 10 and 120
P.R. 1893.

⁸ 12 P.R. 1901 ; 50 P.R. 1902 ; 13
P.R. 1902.

latest cases.¹ In a suit by a father, in which he contested the alienation of ancestral land, the parties belonged to Sikh Jats of Amritsar district and, though they originally came from Rajputana, they were governed by the Customary Law of the Punjab. It was held that the restraint on the alienation by a father of ancestral land applied equally to alienation by him to ancestral houses, gardens and shops.² A recent Full Bench case has laid down that where a father has mortgaged ancestral property for a present advance of money and there is no proof that the money was taken for necessity, his son is entitled to a decree that the mortgage *qua* mortgage shall not affect his rights, but when a decree has been obtained against the father, the son's rights in the ancestral property may also be attached and sold in execution thereof.³ A Jat of the Nakodar Tahsil of the Jullundar district is not authorized by custom to alienate his ancestral land in favour of his grandson to the prejudice of his son.⁴

In the immense majority of cases custom has established the sound and reasonable principle that an alienation shall have finality when once made openly and in good faith by the alienor, and acquiesced in also, reasonably and in good faith, by those competent at the time to contest it, and it shall not be open to be contested by others who may later on come into a position which would, had they held it, have given them the right to challenge the alienation at the time. The right to make a permanent alienation good against all comers with the consent of the collaterals, which would be bad without that consent, is one of the commonest features of the Punjab custom. But when a reversionary interest is in question, a more remote reversioner is not

¹ See 101 P. R. 1895 ; 75 P. R. 1898 among others. ⁵³ P. R. 1901 : s.c. 62, P. L. R. 1901 (F. B.). See also 152 P. R. 1888 :

² *Ram Rakha Mnl v. Balwant Singh* 58 P. R. 1905.

³ *Bahadur Singh v. Desraj*

33 P. R. 1892 ; 72 P. R. 1898.

⁴ *Narain Singh v. Ishar Singh*,

31 P. L. R. 1902.

necessarily debarred from protecting his future interest by the fact that a nearer reversioner does not care to protect his, and without sufficient reason neglects to do so. Custom has not established a perpetual entail in Customary Law.¹

A childless proprietor has power to alienate his ancestral property.² The legality of every alienation by a male childless proprietor of one of the agricultural classes may be presumed until the contrary is proved. The Full Bench, in *Jowala v. Hira Singh*, held by a majority that in the absence of an instance or direct proof of a custom, a transfer of ancestral immoveable property by a childless male proprietor, who had no heirs existing at the time capable of challenging it, could not be contested by a son born or begotten by the proprietor after the transfer.³ Amongst Mahtons of Hoshiarpur there is no custom prohibiting a childless proprietor from selling his interest in an estate otherwise than for necessity without the consent of his near collaterals.⁴ By custom prevalent among Mair Manas of Jhilum district, a childless proprietor is not entitled to alienate, by gift or will, ancestral property to the prejudice of his agnates.⁵ The Bhabras of the city of Rawulpindi are not governed by the custom prevailing among agriculturists precluding childless proprietors from alienating property without necessity.⁶ Under customs prevailing in the village of Siwan, in the district of Karnal, a non-proprietor is entitled to transfer his house built upon land originally belonging to the proprietary body and occupied by his family for several generations.⁷

Childless
proprietor's
power of
alienation.

¹ *Labhu v. Nikali*, 7 P. R. 1905 : S.C. 66 P. L. R. 1905.

² *Haidar Khan v. Jahan Khan*, 65 P. L. R. 1902,

³ 9 and 53 P. R. 1899.

⁴ *Sohna Shah v. Dipa Shah*, 15

⁵ 55 P. R. 1903 (F.B.). See per C. J. dissenting.

⁵ P. R. 1902. See *Labh Singh v. Gopi*, 15 P. R. 1902.

⁶ 119 P. R. 1880.

⁷ *Badri v. Udro*, 73 P. R. 1903

For services
rendered.

Under Customary Law it is a well-known rule that a childless male proprietor can alienate in favour of his relations who have rendered him services in bringing his land under cultivation, or in managing it for him when he was himself incapable of so doing, as against other relations.¹ In *Punnu Khan v. Sandal Khan*,² it was observed that "the right of a childless male owner to appoint an heir is generally, if not universally, acknowledged, and it has been rightly treated as merely a form of gift. It is founded on consideration of equity and convenience; for the childless male owner ought to be allowed to make arrangements for his comforts and maintenance in his old age, and for a companion to help him in his daily affairs. He cannot be compelled to nurse his property for the benefit of his agnates irrespective of all personal considerations. If he can appoint an heir on these grounds, it is not unreasonable to expect that custom would allow him to make a gift where the donee is not actually adopted as a son or appointed heir, but is specially connected with the donor by being associated or helping in cultivation and rendering him service. Such a person holds a position very analogous to that of the adopted son or adopted heir." A gift by a childless Kabull to a near collateral with the consent of the near agnate relations was held to be valid.³ Amongst Kang Jats of Garhshankar Tahsil, a gift by a sonless proprietor to one of his heirs who has been helping him was held valid by custom.⁴ Among Dhat Jats of Hoshiarpur a gift by a childless proprietor in favour of one of his agnates, who is not his next heir, for services rendered to the donor, is not invalid.⁵ Among the Thirwars of the same district a childless male owner can make a gift of his lands to one of his collaterals in preference

¹ 116 P.R. 1886; 85 P.R. 1889;

⁴ 14 P.R. 1901.

¹¹⁶ P.R. 1894.

⁵ *Atma Singh v. Nandh Singh*,

² 92 P.R. 1901.

61 P.R. 1901.

³ 72 P.R. 1900.

to his other collaterals in consideration of services rendered to him by the donee.¹

Gifts are frequently permitted by a sonless proprietor to a daughter whose *doli* has never left her father's house, or whose husband has resided with her father as a *khana-damad*, or, to a *khana-damad*. Similar gifts occasionally made to a sister or her issue have been held to be valid. In a case in point the Additional Commissioner of Amritsar found that the universal custom of the country was that gifts to daughters could only be made with the consent of the male collaterals.² In another case it was held that a gift to a daughter with the consent of the nearest heir was valid as against remote reversioners.³ Among the Arians of Hoshiarpur a gift to a daughter of the ancestral property is held valid.⁴ In another case a gift to a daughter in presence of collaterals was also held valid. In the district of Sialkote, amongst Ghuman Jats, a gift to a daughter and her son of self-acquired property and a part of ancestral property was valid.⁵ A gift of ancestral property in favour of a daughter and her son among the Arians of Jullundar is valid.⁶ Among the Arians of Jullundar a gift by a childless proprietor of his entire estate to his daughter's son is valid by custom, and there can be no distinction in principle between such a gift and the one made to a daughter's son.⁷ But amongst the Arians of the Ludhiana district a father has no power to make a gift in favour of his daughter.⁸ A custom permitting gifts to daughters and their issue cannot be extended so as to authorize a gift to a son-in law.⁹ A gift to a brother or nephew is often permitted.¹⁰

In favour of
daughters.

¹ *Rajneda v. Lehnu*, 96 P. R. 1906. See also *Boja v. Muishi*, 96 P. L. R. 1903.

² 14 P. R. 1903.

³ 133 P. R. 1906.

⁴ Reported in 1550 of 1876.

⁵ 89 P. R. 1898; followed in

49 P. R. 1899.

⁶ 84 P. R. 1900.

⁷ 137 P. R. 1879; 65 P. R. 1880;

⁸ 82 P. R. 1900.

⁸ 48 P. R. 1883.

⁹ 85 P. R. 1900.

¹⁰ 77 P. R. 1869; 71 P. R.

For pious purposes.

Gifts for pious or religious purposes to a small extent, but not when embracing the bulk of the donor's estate, are generally allowable. An alienation for the purpose of sinking a well by a soulless proprietor among Datt Brahmans of Gurdashpur was held to be valid by custom.¹

Unequal distribution among heirs.

Among agriculturists in the Punjab the general rule is against unequal distribution of property amongst heirs. Yet a proprietor possesses, by Customary Law, powers to make a partial disposition of his property during his lifetime. A father can give away a portion of his property to one of his sons to the prejudice of his other sons, either by the same or different wives.² Similarly there are instances where a gift of a portion of a man's estate to his brother's son and grandson in the presence of a brother and a nephew has been allowed.³ But in all decisions in favour of unequal alienation there have been special circumstances, such as "services rendered by the alienee to the alienor, or remoteness, and non-residence, or the *onus* has been held discharged by proof of special custom."⁴

Possession necessary to complete a gift.

The primary rule of decision in a case of gift in the Punjab is a custom, and, according to it, possession is ordinarily necessary to complete a gift; and herein it differs from the Hindu law according to which, if the donor does all that he can to perfect his contemplated gift, he cannot be compelled to do more.⁵ A gift to be valid, therefore, must ordinarily be followed by possession and must be free from undue influence.⁶

Female's power to alienate.

A female in possession of an immoveable property, acquired from her husband, father, grandfather, son or grandson, otherwise than as a free and absolute gift, cannot permanently alienate such property. But the property

1880 ; 126 P. R. 1883 ; 113 P. R.

¹ 101 P. R. 1892.

1891 ; 49 P. R. 1898.

² *Amir v. Zeba*, 42 P.R. 1902.

¹ *Tara Singh v. Gogal Singh*,

³ *Lila Kishen v. Hoa Ram*, 45

26 P. R. 1905.

⁴ P. R. 1901.

⁵ 126 & 164 P. R. 1879 ; 15 &

⁶ 22 P. R. 1867 ; 34 P. R. 1891 :

18 P.R. 1880 ; 23 & 125 P.R. 1893.

⁷ 15 P. R. 1895.

which she acquires as an absolute gift she has every right to dispose of in any way she likes. She can always sell or mortgage any property in which she has either an absolute or life-interest. In the case of a widow claiming the power to give absolutely with the assent of reversioners, the *onus* of proof rests heavily on the person who seeks to maintain such an alienation contrary to the usual custom, which restricts the widow's power to alienate to the term of her life-tenure. The fact that certain nearer reversioners have assented to a gift by a widow in favour of a near reversioner does not bar the claim of a reversioner who is equally entitled.¹

The proper person to object to an alienation is the reversionary heir.² There is no definite rule that, up to a certain degree of propinquity alone, kinsmen have a right to impeach alienation of ancestral lands and, beyond that degree, they have not. In the absence of special facts it cannot be laid down as a general principle of Customary Law, or as a deduction from the decided cases, that an alienation by a childless proprietor in favour of an agnate of equal or nearer degree is valid. The only exception is where a gift is made to a collateral relation who has rendered services to the donor and there are strong equities in his favour.³

A soulless Mahton Rajput of the Jullundar district alienated his land and house by way of gift to his daughter's son with the consent of all the near collaterals. Certain distant reversioners brought a suit impugning the alienation. The defence was that the gift was good by custom, and that as the widow of the brother's grandson of the donor was alive, plaintiffs could not maintain the suit. It was found that in the class to which the parties belonged, a widow had a preferential right to succeed to

Reversioner
to object to
alienation.

¹ *Thakur Singh v. Hira Singh*, * * * *Khazan Singh v. Relu*, 35 P.R. 56 P. L. R. 1903. 1906.

² 24 P. R. 1877; 7 P. R. 1893.

any property of her husband's collaterals, just as her husband would have succeeded thereto, if alive. It was held, therefore, that the reversioners had no right to sue while the widow, having a right to succeed in preference to the plaintiffs who are distant reversioners, is alive.¹

The next reversioner, however remote, is generally entitled to object to an alienation by a female.² Among Domra Jats of Dera Ismail Khan, only collaterals removed in the fourth degree from the deceased are entitled to object to an alienation made by his widow.³ Among Bajwah Jats of Sialkote district, collaterals so distantly related as the eleventh degree from the common ancestor are not entitled, by custom, to object to an alienation by a childless proprietor.⁴ Among Arians of Konwali *got* in Lahore, the sister and sister's son of a childless proprietor are competent to file a suit to set aside a mortgage as having been made without necessity by the widow of the deceased proprietor.⁵ In *Sundar Singh v. Sain Ditta*, it was held that a suit for a declaration that an alienation of ancestral property by a sonless proprietor is of no effect against his collaterals (plaintiffs) was not barred by reason of the presence of female heirs of the proprietor. But until the death or re-marriage of the widow of the deceased proprietor, entitled to a life-estate, the collaterals are not entitled to claim possession from the alienee.⁶ In the absence of any direct heirs the proprietary body in a village community may be shown to have a customary right to contest an alienation by one of their body.⁷

Acquiescence
by rever-
sioners.

Where reversioners acquiesce in an alienation by a sonless proprietor by express or tacit consent, they cannot

¹ *Khem Singh v. Biru*, 44 P. R. 1905.

² *Bhagan v. Taban*, 29 P. L. R. 1902; this case distinguished P.R.

³ 11 P.R. 1888.

⁴ 174 of 1889.

⁵ *Dilwar v. Jatti*, 2 P. R. 1901.

⁶ 29 P. R. 1903.

⁷ *Hardas Singh v. Buta*, 94 P. L. R. 1903.

⁸ 43 P. R. 1877; 78 P. R. 1888.

again question or impugn such alienation.¹ A childless proprietor was so crippled by rheumatism as to be hardly capable of moving about. In consideration of the personal services of the defendant, without which he could not have carried on the cultivation of his land and maintained himself, he made a gift of half of his land to the defendant. It was held that the plaintiff, a reversioner, was not entitled upon the death of the proprietor to challenge the validity of the gift, when the plaintiff had conducted himself in such a way as to lead the defendant to believe that he had no objection to the gift and had left him to act on that belief.²

In *Bano v. Fateh Khan*, the majority of the Full Bench held that the distinction under the Punjab Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only. Where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation. The *dissentiente* Chief Judge held that under the Punjab Customary Law there is a marked distinction between the power of gift and the power of Will, and though the existence of a power of gift is a strong point in favour of the party asserting a power of Will, it is not sufficient to relieve him of the *onus* of proving the existence of the power of Will under the Customary Law.³

Distinction
between gift
and will.

The power of transfer by Will among Sandhu Jats of Tarn Taran Tahsil of the Amritsar district is not co-extensive with the power of transfer *inter vivos*. So where a childless proprietor bequeathed by a Will his ancestral property to a person who rendered him services, and a nearer collateral of the deceased, who refused to serve the latter, sued to obtain the same property on the demise of the childless proprietor, the Court held that the legatee on whom the *onus* lay, had failed to show that he was

¹ *Natha Singh v. Bhagwan Das*, 97 P. L. R. 1902; ² *Boja v. Muishi*, 96 P. L. R. 1903.

³ *Roda v. Harnam Singh*, 102 P. R. 1902; ⁴ 48 P. R. 1903 (F.B.).
Labhu v. Nihali, 7 P. R. 1905.

entitled to take under a Will to the detriment of the collateral though the father refused to serve and the former did serve the deceased.¹ In *Hayat v. Hidayat*, an alienation by a childless male proprietor of his ancestral property by Will, in favour of his sister's son as against the rights of his nephew, was set aside.²

MARRIAGE AND DIVORCE.

A marriage to be binding amongst orthodox Hindus, both bride and bridegroom must not be within the prohibited degrees of consanguinity. As to what is, and what is not, a prohibited degree is a matter of practice or usage. For instance, according to modern practice a mother's brother's daughter, father's sister's daughter, or sister's daughter is not within the prohibited degree. Among Hindu agriculturists the bride and bridegroom must be of the same *got* and tribe.³ No particular form of ceremony is necessary, even among higher castes, to constitute a marriage. In fact, it is not the ceremonies but the consent of the parties which constitutes marriage. In the case of a minor the proper consent of the parents or guardians is necessary.

As a general rule a Hindu marries a girl of his own caste; a Mahomedan will not generally marry a girl who belongs to a different religion. But it is not uncommon to find a Mahomedan of rank marrying a Rajput woman. Many instances of this sort of inter-marriage have taken place among the Mandal families of Karnal.⁴ It is also well-known that many Rajputs and Sikh Sardars contract a form of marriage known as *chuddar andazi*⁵ with Mahomedan women. In a case in Lahore in which

Chuddar Andazi.

¹ *Ishar Singh v. Lehna Singh*, p 120; Vol. IV p. 95; Vol. V p. 46. 86 P. R. 1903 : s. c. 145 P. L. R. ⁴ *Rustam Ali v. Asmat Ali* 1903. 13 P. R. 1875.

² 40 P. L. R. 1905.

³ Tupper's Customary Law Vol.II

⁵ Literally means throwing a sheet over.

a Mahomedan prostitute claimed to succeed as co-widow to the estate of a certain deceased Sikh chief on the strength of an alleged marriage by *chuddar andazi*, a large number of Sikh Sardars were examined and they all said that such a marriage was not sanctioned by usage. It is no doubt that many Hindu Sikh Rajahs and Sardars contracted *chuddar andazi* marriages with Mahomedan women. But that was not in pursuance of any prevailing usage but rather that such marriages were "as acts of sovereign will and pleasure which set all law and usage at defiance."¹ In *Jawala Singh v. Sukh Devi*² it was held that in the district of Hoshiarpur, a Jat Jagirdar could not legally marry a Brahman woman; and that if a ceremony, such as *chuddar andazi*, was gone through between the parties, it would not confer any rights of inheritance on the woman, as a lawful widow, to any property which the man might leave at his death, but that she would only be entitled to receive food and raiment as long as she continued to lead a chaste life. A marriage by *chuddar andazi* between a Brahman and a widow is not valid by custom.³ The widow after such marriage is called a *dharel* wife. Among Khatries of Majetha in the Amritsar district, the children of a *dharel* mother do not succeed to the exclusion of a widow legitimately married.⁴ In *Nathu v. Ram Das*⁵ it was held that the children of a Khatri and Khatrani widow born after her re-marriage with him in the *chuddar andazi* form are not illegitimate as the marriage is valid and lawful.

We have, already, referred to *paribarta* or exchange marriage as being prevalent in Bengal.⁶ It is not uncommon in the Punjab. The custom owes its origin to the same state of the society among certain particular tribes or classes of people in the Punjab as in other parts of India,

Exchange
marriage.

¹ See *Musst Chand v. Raj Kaur*.

⁴ 21 P.R. 1893.

² 1233 of 1869.

⁵ 4 P.L.R. 1905; followed 49

³ 5 P.R. 1893. *Lalchand v. Tha-*
kur Devi 49 P.R. 1903.

P.R. 1903.

⁶ Vide *supra* p. 304.

viz., the paucity of girls of the same *gotra* and the desire to keep the property within the class or tribe or community. In a case where a number of Khatri, all of the same caste and community, arranged a number of marriages amongst themselves, none of which was shown to be *prima facie* unsuitable or undesirable and where there was nothing to show that the performance of one of the betrothal contracts was to be made dependent on the previous performance of the others, and the arrangements were made independently of each other, though at one and the same time, it was held that the betrothal contracts were not opposed to public policy and damages could be recovered on breach of them.¹ Such inter-marriage stands on a totally different footing and is not like a marriage where a girl is given away for a sum of money paid to her parents without any regard to the suitability of the marriage or the future happiness of the girl. Certainly, where the only consideration for the marriage of a girl is a sum of money to be paid for her, the contract of such a marriage would be void, being opposed to public policy.

Kurao marriage.

Widow re-marriage in the *kurao* form is prevalent in the Punjab and is regarded as a valid marriage. Such a marriage by a widow with the brother or some other male relative of her deceased husband requires no religious ceremonies, and confers all the rights of a valid marriage.² Amongst Brahmans and pure Rajputs, *kurao* marriage is reprobated and confers no rights of inheritance on the issue born of it.³ Among some tribes widow

¹ *Amir Chand v. Ram* 50 P.R. 1903.

² 38 P.R. 1879 (Hoshiarpur); 316 of 1879 (Sindhu Jats of Ludhiana); 26 P.R. 1880; 36 P.R. 1881 (Bishnoi Jats of Hissar); 48 and 98 P.R. 1890; 54 P.R. 1900 (Kahman Jats). See also Tupper's Customary Law, Vol. II. p. 95. Among certain classes a repudiated

wife may marry again by the *Kurao* form. See 998 of 1871; 607 of 1886 (Sindhu Jats); 84 P.R. 1889 (Chimah Jats of Sialkote); Cf. 88 of 1886 (Manhas Rajputs of Sialkote).

³ 2 P.R. 1872; 22 P.R. 1873; 113 P.R. 1885; 57 P.R. 1893. But see 48 P.R. 1890. *contra*.

re-marriage is sanctioned by custom, e.g., Sartora Rajputs of Kangra.¹

A woman cannot marry a second husband while her first husband is alive, unless the first marriage is validly set aside.² Among Jats in the Punjab, a deserted wife or one who has been set aside by her husband can, by their custom, marry another man in the life-time of her first husband.³

RELIGIOUS INSTITUTIONS.

Ordinarily custom regulates succession to the management of religious institutions in the Punjab.⁴ A successor is either elected or nominated. The mode of election or nomination is the same in the Punjab as in other parts of India.⁵

The office of a *mohunt* is generally elective and not hereditary.⁶ But a *mohunt* may nominate a successor subject to confirmation by the brotherhood.⁷ It is not absolutely necessary that a *mohunt* should be appointed.⁸ Both male and female are eligible for election to a *mohuntship*. When a woman is elected she may succeed to the *gadi* of a *mohunt*. In one instance it was found as a fact that the deceased *mohunt* of a religious institution in Delhi had nominated one of his female disciples as his successor, and she was accordingly allowed to succeed as *gadinishin*.⁹ In this case several *Pants* of neighbouring shrines were examined and they one and all supported the title of the female disciple who brought this suit for *mohuntship*.

¹ 98 P. R. 1890.

² 36 P. R. 1881; 72 P. R. 1892.

³ *Chatar Singh v. Mane*, 998 of 1871.

⁴ 32, 52 and 76 P. R. 1867.

⁵ *Vide Hindu Customs : Religious Endowments. Supra p. 231 et seq.*

⁶ *Babu Ganga Nath v. Rabel Nath*, 143 P. L. R. 1906.

⁷ See 173, P. R. 1869; 4 P. R. 1870; 175 P. R. 1889; 105 P. R. 1892; 3 P.R. 1899.

⁸ 76 P. R. 1867; 338 of 1868.

⁹ *Munnia v. Jiwan Das*, 76 P. R. 1874.

A *mohunt*, as the head of a religious institution, is regarded as a trustee, and as such, any alienation by him, *prima facie*, would be considered as a breach of trust.¹ Except for necessary purposes, no property belonging to a religious institution can be permanently alienated.² By *necessary purposes* is ordinarily meant the expenses of keeping up religious worship, repairing the temples or other buildings connected with the institution, defending hostile litigious attacks and other like objects. In *Kashiram v. Bawa Tola*,³ it was held that the power of the head of a religious institution is a limited one. He can only alienate for necessary purposes; but this alone is not sufficient. Not only must the debts be incurred for necessary purposes but it must also be shewn that such purposes could not be fulfilled except by contracting those debts, and that the ordinary income of the endowment was not available or was insufficient for them, and that the debts could not be discharged from the income. Persons who lend money to the heads of religious institutions are bound to enquire whether the occasion on which they advance money is such that the loan is justified by the state of the funds of the institution, and the purpose for which the loan is taken. It is not enough to show that the purposes for which loans were taken were necessary purposes. The lenders must satisfy themselves that there was a real necessity to contract the debt having regard to the income of the property of the institution.⁴

So long a *mohunt* retains his office he is presumed to have the sole management of the endowment.⁵ In small institutions, however, where the number of disciples are few, they have an equal voice in the administration of the property.⁶

¹ *Maharani Shibessuri Debia v. Mothooranath Acharjo*, 13 Moo. I. A. 270 (1869).

² 192 P. R. 1880; 39 P. R. 1882; 186 P. R. 1889.

³ 3 P. R. 1902.

⁴ *Gurmukh Singh v. Sundar Singh*, 45 P. R. 1903.

⁵ 76 P. R. 1867.

⁶ *Ibid.*

A *mohunt*, if he is found incompetent or if he in any way misconducts himself, may be expelled.¹ But before he can be removed, the misconduct or mismanagement alleged against him must be clearly proved ; further, it must be also clearly shown that the alleged misconduct or mismanagement is of so serious a nature as to render the retention of the *mohunt* in question undesirable and detrimental to the interests of the shrine and its worshippers.² The *shebaits* or the trustees of an endowment may possess the right to sue in such a case.³ But the right must be shewn to be exercisable by general or special custom.⁴ In *Bhagwan Das v. Hardit Singh*,⁵ the Subordinate Judge found that *mohunts* of a religious institution had misconducted themselves and mismanaged the institution to an extent justifying their removal. He accordingly ordered the removal of the *mohunts* from possession of the lands attached to the institution. The case was instituted by the representatives of the village and the villagers did not take any share in the management of the institution nor did they ever assert any right to control the succession of the *mohuntship*. On second appeal the Chief Court held that since the villagers had not established by evidence their customary right to interfere even if there was the clearest proof of gross misconduct, the suit must be dismissed. It, in fact, found that there was no sufficient proof of misconduct against the *mohunts*. The general principle on which cases of the kind should be determined has been laid down in several decisions of this court.⁶

An ascetic or person entering into a religious order becomes dead to the world. He is ordinarily supposed to renounce the world and its affairs. All his rights in property

¹ 81 P. R. 1869 ; II97 of 1877 ;
1039 of 1881.

⁴ 122 P. R. 1890.

⁵ 52 P. L. R. 1905.

² *Ramkishen v. Chet Singh*, I3 P. L. R. 1906. ⁶ 22 P. R. 1890 ; 3 P. R. 1899 ; 89 P. R. 1901.

³ 81 P. R. 1869 ; 2063 of 1880.

Ascetics.

become extinct and he cannot legally perform any purely worldly act. In *Teku v. Basti* it was held that the general custom of the sect was in accordance with the Hindu law, and that an ascetic could not renounce his religious order, nor perform such worldly act as the adoption of a son so as to constitute him his heir to property.¹ He cannot acquire a private property. All property acquired by individual members is looked upon as belonging to, and for the benefit of, the religious institution to which they are attached.² But the *majawars* of the shrine of Data Ganj Baksh at Lahore are permitted to have private property.³

Bairagees and some of the *Baidi* class⁴ who are found in Amritsar and Gurdaspur are not ascetics at all. They carry on trade and belong to the *grihi* or house-holder class. They marry and beget children like other persons.⁵ Certain *Udasi* sects in the Jullundar district⁶ and *Dadupanth Fakirs* in the Ferozepur district⁷ are not recognized as ascetics. Among the *gharbari gossains* of the Kangra Valley they marry and are succeeded by their widows.⁸

Chela.

A *chela* ordinarily succeeds to the *gadi* of his deceased *guru*. In the absence of any *chela* of the last holder, the land reverts to the *mohunt* of the superior *gadi* to which the institution concerned is subordinate.⁹ Where a *chela* of the last incumbent alleged that he was entitled to succeed as a *chela*, and that installation to the *gadi* was not required by the custom of

¹ 15 P. R. 1874. See also 7 P. R. 1892.

² *Tota Puri v. Padam Puri* 21 P. R. 1874.

³ 38 P. R. 1883.

⁴ For a short account of the origin and customs of these sects, see Col. Henry Court's translation of the *Sikhian de Raj di Vikhia* pp. 106-114. See also Mr. Maclagan's Census Report for the Punjab 1891, Chap. IV for an

exhaustive account of all religious sects in the Punjab. See 1887 of 1879, 713 of 1892, and 106 P.R. 1892 (for *Khankah*) and 143 P.L.R. 1906 (for *Jhuggi*) as religious institutions.

⁵ 24 P.R. 1880; 29 P. R. 1881.

⁶ 29 P. R. 1881.

⁷ 1538 of 1881.

⁸ 135 P.R. 1884.

⁹ *Hari Devi v. Charan Das* 12 P. L. R. 1906.

the institution, the Court found that he had failed to show any custom enabling him to succeed irrespective of election or installation or nomination to the headship of the institution and that the mere fact of his being a *chela* of the last holder was not sufficient to support his claim.¹ The rule of succession from *guru* to *chela* cannot be altered to make the lands descendible to the heirs of the last holder of it, by his entering married life against the custom of the order.² The *chelas* are entitled to maintenance as long as they behave properly and observe a proper subordination to the head of the institution.³

PRE-EMPTION.

In the Punjab the right of pre-emption is based either on the provisions of the Act or on local custom.⁴ In the *Wajib-ul-urz* of almost every village the right of pre-emption is recorded. It is exercised by co-sharers, at their option, on the sale of lands. It extends by statute to all sales of immoveable property, and to the foreclosure of rights to redeem such property. The right must be claimed by one who is himself a proprietor of the property by virtue of which the pre-emption is claimed.⁵ A perpetual lease does not give rise to a right of pre-emption merely on the ground that it is tantamount to a sale. For the right of pre-emption as stated above arises in respect of sales of immoveable property and foreclosure of rights to redeem such property. It must be an out-and-out sale, though the sale may be under a decree or otherwise.⁶ Local custom at times recognizes a claim to pre-emption in the case of mortgages, and where such custom is proved to exist, effect must be given to it.⁷

¹ 143 P. L. R. 1906.

9 W. R. 455 (1868).

² 12 P. L. R. 1906.

⁶ 43 P. R. 1892.

³ 84 P. R. 1866.

⁷ 53 P. R. 1877 ; 10 P. R. 1887 ;

⁴ 8 P. R. 1893.

378 P. R. 1892 ; II P. R. 1901.

⁵ *Beharee Ram v. Shoobhudra*,

Depends on
vicinage.

The right of pre-emption generally depends on vicinage, and whether the pre-emptor has a common wall, or is a partner with the vendor in a common right of way or other easement affecting both properties.¹ The nearest kinsman is generally entitled to the first offer of purchase;² but nearness of relationship by itself does not usually confer any superior right of pre-emption.³ One co-parcener can claim no right of pre-emption as against another co-parcener.⁴ Nor can one of two rival claimants possessing equal rights claim a moiety of the property sold. In such a case the claimant who first brings a suit to enforce his right is entitled to the whole property.⁵ Under a custom prevailing in the village of Patni, in Dera Ghazi Khan, the collaterals of a vendor have a superior right of pre-emption to that of others who are equally co-sharers in the well to which the land sold belongs, but who are not themselves collaterals.⁶ Where the entry in the *Wajib-ul-urz* records custom of pre-emption only in favour of *ek-jaddis*, the co-sharers in the village who are not *ek-jaddis* cannot succeed as against the vendor who owns no land in the village.⁷ The proprietor of a *Dharmasala* may claim pre-emption.⁸

Presumption.

Right of pre-emption is presumed to exist in villages whether such right is recorded in the settlement record or not. It extends to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary and to all transferable rights of occupancy. But there is no such presumption as to the existence of a

¹ 1464 of 1875 ; 83 & 97 P. R. 1880 ; 33 P. R. 1885 ; 42 P. R. 1891 ; 199 P. R. 1889 ; 129 P. L. R. 905 ; 57 P. R. 1906 ; 17 P. R. 1903 ; 77 P. P. 1906.

² 121 P. R. 1879 ; 196 P. R. 1889.

³ 54 P. R. 1880 ; 113 P. R. 1881 ; 53 P. R. 1888 ; 37 P. R. 1906.

⁴ *Lalla Nowbut Lall v. Lalla Jewan Lall* 4 Cal. 831 (F. B.). [1878].

⁵ 102 P. R. 1881 ; 83 P. R. 1888. * 73 P. R. 1901.

⁶ 72 P. L. R. 1906. The term *ek-jaddis* used in the pre-emption clause of a *Wajib-ul-urz* means persons descended from the ancestor who once held the land which is the subject of the sale, and not agnates only of the vendor.

⁷ 100 P. R. 1885.

right of pre-emption in towns,¹ though such right has been shown to exist according to custom and recognized by Courts in numerous cases.² Where vicinage confers the right of pre-emption in respect of houses in a town, a plaintiff who asserts that his vicinage is of a superior kind to that of the defendant must prove his assertion.³

VILLAGE COMMON LAND.

The village common land is a plot of land in every village reserved for purposes of common pasture, for

¹ *Vide* Act IV of 1872 as amended by Act XII of 1878.

² *For instance* :—

In Amritsar :—46 and 154 P. R. 1882 ; 99 P. R. 1906 ; 140 P. R. 1906 ;

In Delhi :—68 P. R. 1879 ; 64 P. R. 1887 ; 1392 of 1889 ; 75 P. L. R. 1906 ; 67 P. R. 1906 ; 81 P. R. 1906.

In Ferozepur :—14 P.R. 1903.

In Gujarat :—83 P. R. 1880 ; 113 P. R. 1881 ; 13 P.R. 1890.

In Gujranwala :—56 P. R. 1885.

In Hissar :—90 P. R. 1901 (in respect of shops).

In Jullundar :—12 P. R. 1883 ; 33 P. R. 1885 ; 53 P. R. 1888.

In Karnal :—129 P. L. R. 1905.

In Lahore :—1569 of 1879 ; 189 P. R. 1882 ; 48 P. R. 1888 ; 5 P. R. 1903.

In Ludhiana :—192 P.R. 1888 ; 38 P. R. 1906.

In Multan :—83 and 165 P. R. 1888 ; 57 P. R. 1906.

In Panipat 24 P. R. 1887.

In Peshawar :—10 P. R. 1886 ; 29 P. R. 1888 ; 42 P. R. 1903.

In Rohtak :—55 P. R. 1880.

In Sialkote :—37 P. R. 1888.

In following sub-divisions of

towns and cities pre-emption has not been found to prevail :—

Amritsar :—In *Kanak Mandi* Sub-Division (170 P. R. 1889).

Bhiwani :—(in the Hassar district) in *Bagh Dhaggan* (16 P. R. 1902); in *Thoola Norson*, *Panna Jaunpal* 71 P. R. 1902.

Delhi :—In the city, in respect of large *Katra* or Square comprising distinct shops (64 P. R. 1887).

Jagraon :—In *Mohulla Bhogi* (100 P. R. 1892).

Lahore :—In *Kucha Sathan* Sub-Eivision, in respect of mortgages. (72 P R 1886); in *Bazar Chahattu Mufti Bakar* (83 P.R.1901);

in *Mohulla Qazi Sadar-ud-din* including *Kucha Chabuk Sawaran* otherwise known as *Kucha Khaqizian* (86 P. R. 1901); in *Mohulla Kakkazaiun*, pre-emption by virtue of ownership of opposite house but separate from the one unsold (68 P. R. 1906).

Multan :—In *Mohulla Sultan-ganj* (170 P. R. 1889).

Mukerian :—(in the Hoshiarpur district) 70 P. R. 1902.

Sonepat :—In *Mohulla Mashad* 85 P. L. R. 1906.

* 17 P. R. 1903.

assembling of the people, for grazing cattle and for a possible extension of the village dwellings. It is always regarded as a common property of the original settlers, and their descendants. And occasionally also those who assisted the settlers in clearing the waste and bringing it under cultivation are recognized as having a share in it. Unless it is sanctioned by custom none of the proprietors have any power to alter the condition of the common land without the consent of all the co-sharers.¹ Any individual proprietor cannot plant or cut trees on the common land, nor can he sink a well, nor appropriate houses built for common purposes except with the consent of all the co-proprietors.² In the absence of custom, the will of the majority of a village community cannot prevail over that of the minority when the question is the disposal of the common property in such a way as to preclude all use of it by the owners.³ A majority of the proprietors can demand partition of the common land.⁴ When a common land has once been partitioned, a re-distribution of it cannot be demanded in the absence of a well-established custom or of an express agreement.⁵

Each proprietor has a right of property in his dwelling house in the village, entitling him to exclusive possession.⁶ In villages the proprietary right in the *abadi* (*i. e.* inhabited village site) is, as a rule, vested in the proprietary body.⁷ The mere possession of a vacant site in the *abadi* confers no absolute right in the possessor to dispose of the same to a non-proprietary resident.⁸ A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use.⁹ A non-proprietary resident cannot, in the absence of a well-established custom, dispose

¹ 109 P. R. 1879; 73 P. R.

⁴ 8 P. R. 1868.

1882; 54 P. R. 1885; 54 and 70 P. R. 1886.

⁵ Vide s. 125 Punjab Land Revenue Act 1887.

² 718 of 1869; 1117 of 1870;

⁶ 67 P. R. 1869.

74 P. R. 1888.

⁷ 822 of 1883.

³ 76 P. R. 1873; 78 P. R. 1877; 30 P. R. 1879; 7 P. R. 1885; 54 P. R. 1886.

⁸ 24 P. R. 1878.

⁹ 1038 of 1880; 937 of 1882.

of the site on which his house is built, or a right of residence in the house, without the consent of the proprietors of the village.¹

In villages that have grown into towns or *qasbas*, such as Barsat, Panipat, and Karnal, the proprietor of the house is held to be the proprietor of the site on which it is built.² In such *qasbas* the right of occupation is usually transferable.³

On the death of a non-proprietor his direct male descendants, and, failing them, his widow, and, in the absence of his widow, his mother will succeed to his rights in the house occupied by him. His remote collaterals are excluded altogether.⁴

One very characteristic feature of the village system is that an absent proprietor can recover possession of his original holding on his return to the village by reimbursing the occupant of his land for the cost of improvement effected and for all losses incurred by him. The length of time he was dispossessed is immaterial. This is a very ancient custom and has been recognized by Courts of law.⁵ This customary right, however, may be controlled by express agreement.⁶ The heir or representative of the absentee-proprietor may also bring a suit to recover the holding at the death of the deceased absentee, provided the latter by his conduct has not shown his intention to abandon the holding.⁷ Where the occupant of a holding by some overt act sets up an adverse title of his own, the absentee or his representative must sue to recover his rights within twelve

Rights of absent proprietor.

¹ 125 P. R. 1879 ; 53 P. R. 1881;

76 P. R. 1888.

119 P. R. 1884 ; 40 P. R. 1886 ; 50

⁵ *Vide* 7 P. R. 1868 Revenue ;

P. R. 1889 ; 99 P. R. 1892 ; 1197

153 of 1871 ; 1254 of 1877 ; Financial

of 1893 ; 48 and 62 P. R. 1899 ; 7

Commissioner's Letter, dated the 11th July, 1865, to the Judicial

P. R. 1900.

Commissioner, Punjab.

² 48 P. R. 1881 ; 9 P. R. 1882 ;

⁶ 28 P. R. of 1876 ; 25 P. R.

87 P. R. 1884.

1877 ; 981 of 1880.

³ 48 P. R. 1884. See also 38 P.R.

1895 and other cases.

⁷ 33 P. R. 1878 ; 1223 of 1886 ;

⁴ 37 P. R. 1887 ; 71 P. R. 1889 :

833 of 1891 ; 109 P. R. 1892.

years from the date of such assertion.¹ An absentee relinquishing the ownership of the land cannot take advantage of an agreement in his favour.² An intention to relinquish is not manifested merely by absence, though long absence coupled with an entire severance from all concern with the land gives rise to such a presumption.³

AMONG MAHOMEDANS.

Inheritance.

Among Mahomedans in the Punjab succession runs in the male line.⁴ *Pugvand* and *Chundavand* rules of succession are also prevalent among them. The *pugvand* rule is the normal custom. It prevails in Peshawar,⁵ amongst the Raiens of Jullundar,⁶ the Awans of Shahpur,⁷ the Sayads of Rohtak,⁸ the Dogars of Ferozepore,⁹ and the Pathans of Amritsar;¹⁰ also among the Gunzals,¹¹ and the Sunghara Jats.¹² It is prevalent also among the Turkhelis, Turins, Dilazaks, Dhunds and Tanaolis in Hazara.¹³ The Yusafzai Pathans in Rohtak are by custom governed by the *pugvand* and not by the *chundavand* rule.¹⁴ The custom of descent prevailing among the Sheiks in the Umballa district is *pugvand*.¹⁵ The *chundavand* rule largely prevails amongst the Sayads, Koreshis, and Pathans of the Shahpur district; the Utmanzais, Turks and Sayads in the Hazara district follow the same rule of succession.¹⁶ The Mahomedan Chibhs of Gujarat,¹⁷ and certain Mahomedan families in

¹ 1177 of 1872 : 47 and 78 P. R.
1175 : 837 of 1875.

⁸ 82 P. R. 1887.

11 P. R. 1889,

² 115 P. R. 1876 ; 38 P. R. 1878 ;
1794 of 1880 ; 109 P. R. 1892.

35 P. R. 1889.

429 of 1871.

³ 2095 of 1883, printed at p. 337
P. R. 1884 ; 84 P. R. 1888 ; 113
P. R. 1893.

178 P. R. 1888.

Vide Settlement Report p. 305.

29 P. R. 1905.

⁴ 29 P. R. 1868.

11 P. R. 1905.

⁵ 161 of 1867.

Vide Hazara Settlement Re-

⁶ 524 of 1868.

port p. 305.

⁷ 8 P. R. 1879.

¹⁷ 77 P. R. 1885.

Yusafzai,¹ are governed by the *chundavand* system of succession. A son cannot by custom enforce partition of ancestral immoveable property during his father's life-time.² The share of a son who predeceased his father descends to his son and the son of such son.³

In a case where the parties belonged to the Pathans of Desa in the *chachh ilaqा* of the Rawulpindi district, the defendant pleaded that the whole property left by his father descended to him by a special family custom, the other sons being merely entitled to maintenance. But the custom was not proved. It was accordingly held that the parties being agriculturists of the Western Punjab, the ordinary rule of inheritance of equal succession of all the sons should prevail.⁴ The Koreshis of the Gujranwalla city, who are non-agriculturists, are governed by Mahomedan law and not by custom.⁵ Similarly the Jatoi Bilochs of the Muzaffarghur district are governed by Mahomedan law in the absence of proof of special custom in matters of succession.⁶ Among the Chamar Jats of Multan, as no positive custom was proved regulating the rights of the parties in regard to inheritance, it was held that the Mahomedan law must govern them.⁷

Among agriculturists and non-agriculturists.

Whether in matters of inheritance, the Mahomedan Kashmiris, belonging to the families resident in the Lahore city, and engaged in trade or manufacture therein, were governed by Mahomedan law or by custom formed the subject-matter of decision in a recent case. One party asserted that females inherit in accordance with Mahomedan law; the other party alleged that females are excluded by males according to custom. The Court held upon evidence, that the Kashmiri weavers and traders of the

Kashmiris of Lahore city.

¹ 51 P. R. 1889.

⁴ *Zarif Khan v. Amir Khan* 85

² 1 P. R. 1867.

P. R. 1901.

³ 60 P.R. 1878, (Sayads of Rohtak);
80 P. R. 1882, (Pathans of Attock);

⁵ 92 P. R. 1901.

26 P.R. 1885, (Mahomedan Ranjha
Jats of Bhera.)

⁶ 66 P.R. 1902.

⁷ 117 P. R. 1901.

Lahore city are governed by Mahomedan law and not by custom.¹

Daughters.

As a general rule, married daughters are excluded by collaterals, e.g., among the Rajputs of Jullundar,² the Jats of Rawulpindi,³ the Rajputs of Hoshiarpur⁴ and so forth. But there are exceptions to this general rule. As for instance, amongst the Koreshis of Kasur, daughters exclude brothers and nephews;⁵ among the Awans of Shahpur a right of succession in favour of unmarried daughters is recognized, but this right is liable to be divested after their marriage.⁶ Among Mahomedans in Bunnoo, daughters succeed with sons.⁷ In *Fatima v. Arjmand Ali*⁸ it was held that in the matter of succession in the family to which the parties belonged, daughters succeeded in preference to collaterals according to the family custom. Among the Lodi Pathans of Jullundar they succeed to their father's estate by custom of the family. Where a daughter who has thus succeeded, upon her death, her daughter has a preferential claim by custom of the family and the tribe to succeed as against the collaterals of the father.⁹

Khana-damad.

By custom among the Bangial Jats of the Gujarat district a married daughter is entitled to succeed her father, a sonless proprietor, where he has settled that daughter and her husband in his house and on his land, with a view to their succeeding him as his heirs to the exclusion of his collaterals. It is not necessary that the resident son-in-law (*khana-damad*) must be the first husband of the daughter. The second husband also succeeds even if he happens to have been resident son-in-law in his first wife's family, her

¹ 54 P. R. 1906.

² 27 P. R. 1866.

³ 331 of 1866.

⁸ 41 P. R. 1901.

⁴ 31 of 1867.

⁹ 72 P. L. R. 902. There are numerous decisions of the Punjab Court shewing the exception to the general rule.

⁵ 80 P. R. 1875.

⁶ 801 of 1867.

⁷ 81 P. R. 1879.

father-in-law having died before the second marriage. Delivery into possession before death by the father-in-law is not a necessary condition for succession of the resident son-in-law.¹ Among the Ghakkars of Jhelum, a sonless proprietor may give his ancestral land to his daughter or daughters and their husbands (*khana-damads*).²

Amongst the Gujars of the Rupar Tahasil, a sister excludes a mere co-proprietor of the same village, who is not an agnate.³ Amongst the Moguls of Kharkhodah a sister and her issue exclude collateral descendants of deceased's grandfather.⁴ Amongst the Sayads of Kharkhodah sister's sons are not excluded by male issue of the great-grandfather of the deceased brother. But they are excluded by male issue of the deceased brother.⁵

Under Mahomedan law of inheritance a widow is entitled to a share of the property and not merely to a maintenance. But it may happen that the parties, though Mahomedans, may, by custom, follow Hindu law of inheritance, under which a widow, when there are sons, is entitled to a maintenance.⁶ In another case,⁷ the Chief Court reversing the decision of the lower Appellate Court and giving effect to the custom as recorded in the *Wajib-ul-niz* held that "if any one of the share-holders die without issue (*la-wild*) his widow will have a life-interest provided she may not re marry, but having got possession, she will not be entitled to give the property away to her father, brother or their relatives. On private necessity or for paying the Government demand she can transfer it by mortgage or sale." Thus it is clear, and in fact it is so, that the customary succession of a widow to widow's estate is the same among Mahomedans as among Hindus.

¹ 106 P. R. 1901. See the cases referred to therein.

² 82 P. R. 1887.

³ 74 P. L. R. 1902.

⁴ *Nadu v. Hajizan*, 20 P.R. 1867.

⁵ 136 P. R. 1884.

⁶ *Hijoo v. Meer Mahomed*, 54 P. R. 1867.

⁷ 71 P. R. 1892.

Mahomedan widows, according to the general custom of the country inheriting lands from their husband are entitled only to a life-interest, without power of alienation, except for necessity.¹

Childless widows have only a life-interest in their husbands' lands and houses in Ludhiana,² in Jhelum ;³ in Jullundar ;⁴ in Multan ;⁵ in Hoshiarpur.⁶ Amongst a tribe known as the Chohan Rajputs in Rawulpindi, a childless widow cannot lay claim to any definite share of her husband's lands in the presence of sons by another wife, but that she is only entitled to maintenance as of right. She is, however, entitled to have a definite portion of her husband's property allotted to her for her maintenance, and such portion may, in particular cases, be equal to that allotted to a son.⁷

Among the Majawars of Multan the widow takes only a life-interest in the property of her deceased husband and is not competent to give it away as a gift to the prejudice of the rights of reversionary heirs.⁸ Among the Khankhel Swalhis in the Hazara district a widow can claim only maintenance and has no right to life-estate in her husband's property.⁹

In the absence of any well-established custom to the contrary, a Mahomedan widow who succeeds, either as legatee or heir, to her deceased husband's property succeeds as absolute owner and not merely on life-tenure.¹⁰ Among the Khojas of Kussoor, according to custom, the entire property of a man who dies without sons, devolves on

¹ See 5 P. R. 1868 (Shahabad town); 87 P.R., 1868 (Multan); 938 of 1868 (Umballa); 8 P. R. 1874 (Pathans in Gargaon); 102 P. R. 1901 (Gardezi Sayads, in Multan); 553 of 1869 (in Peshawar).

² 300 of 1870.

³ 950 of 1870.

⁴ 53 P. R. 1872.

⁵ 87 P. R. 1868.

⁶ 583 of 1867, 774 of 1871 and 787 of 1872.

⁷ *Sher Khan v. Bivi*, 30 P. R. 1905.

⁸ 136 P. L.R. 1905.

⁹ 62 P. L. R. 1903.

¹⁰ *Ranee v. Ghulam Ghous*, 3 P. R. 1867.

the widow in full proprietorship, to the exclusion of sisters and their heirs.¹

As we have already said that the custom of adoption is not confined to Hindus only. It also obtains among Mahomedans of the Punjab. A sonless proprietor, in the central and eastern parts of the Punjab, may appoint one kinsman to succeed him as heir.²

Special custom might exist in certain locality prohibiting a son of an adopted son from succeeding in his natural family but the reason that would induce an adopted son to give up his rights in his natural family as against his own brothers would not apply, or, at all events, not with the same force, where it is a question of his succeeding collaterals. Thus in a case in which the parties were the Moguls of Pind Dadan Khan Tahasil, a claim of a son of an adopted son against his natural uncle's estate was allowed.³

Though the claim of a son to have his rights of succession preserved within just limits is considered paramount, a father's power to dispose of his property in his life-time in a village community is not unfrequently exercised. In the absence of any local custom to the contrary, a Mahomedan can, in his life-time, give away the whole of his property.⁴ In *Rukum Din v. Gujri*⁵ it was held that a Mahomedan Jat in the Amritsar district, could sell his share of land to an outsider according to the terms of the village *Wajib-ul-nrz*, with the consent of his co-sharers and that

Son of an adopted son.

Alienation.

¹ *Begum v. Hijance*, 27 P. R. 1868.

1880. Daudzai Pathans of Kaithal : 40 P.R. 1891. Rajputs of Umballa : Man's Rajputs of Ludhiana 79 P.R. 1893. Arains of Gujarat. 70 P. R. 1901. Kathana Gujars of Jhelum.

² *Ghelo v. Haider*, 59 P. R. 1906.

³ *Hajee v. Ghazee* 102 P. R. 1866.

⁴ 576 of 1870

⁵ See, for instance, 58 P. R. 1879, among Mahomedan Raiens of Juliandar ; 120 P.R. 1881, Rawulpindi ; 109 P. R. 1882, Mahomedans of Mahr caste ; 178 P. R. 1883, Jats of Hazra tribe in Sialkote ; 173 P. R. 1883, Rajputs in Nawashahr ; 98 P. R. 1883, Ghori Pathans of Sialkote. But see *contra* 90 P. R.

such transfer could not be contested after his death by his son or widow.

A gift by a proprietor to a relative is valid and can be contested by the proprietary body only on the ground of custom or the constitution of the village as evidenced by the *Wajib-ul-nuz*.¹ But if a proprietor makes a gift or sells his share to an outsider, he would be restrained from doing so by the male collaterals of the proprietor.² Though in large number of cases bequests to daughters' and sisters' sons have been held to be valid, yet in many instances the nephews and other male kindred of the donor have a customary right to intervene and cause the bequests or gift to be cancelled.³

Gift to a daughter and daughter's son by a childless proprietor.

A gift to a daughter and her son by a childless proprietor is not opposed to local custom. As a matter of fact Courts have held such gifts to be valid in number of cases.⁴ Among the Awans of Shahpur, according to custom, the right of testation exists and a transfer of property by gift in favour of daughter's sons without the assent of agnates is held to be valid.⁵ Among the Ghakkars in Jhelum a sonless proprietor may give his ancestral land to his daughter or daughters and their husband.⁶ Among the Janjuhas of the Jhelum district, a childless male proprietor can validly make a gift of his ancestral property in favour of his daughters and sons-in-law without objection on the part of his brothers and nephews.⁷ Custom among the Awans of the Jhelum district fully recognizes the power of male proprietor to make a gift to a daughter's son, who has rendered him service, even in the presence of the son and that the collaterals have no right to question the gift so

¹ 43 P. R. 1877.

1883 ; 93 P. R. 1885 ; 92 P. R.

² 41 of 1874 ; 156 of 1875 ; 62 P. R. 1876.

1888 ; 50 P. R. 1894. 71 P. R.

³ 39 P. R. 1876 ; 873 of 1876.

1898 ; 92 P. R. 1898 ; 98 P. R.

⁴ See, for instance, 1091 of 1866 ; 198 of 1868 ; 270 of 1873 ; 1 P. R.

1898.

⁵ 26 P. R. 1901.

⁶ 53 P. R. 1902.

⁷ 85 P. R. 1904,

made.¹ Among the Sohani Pathans, in Gurdaspur, a sonless proprietor has the power to make a gift of ancestral estate to his daughter in the presence of his brother.² A gift by a sonless Gujar, in the district of Ludhiana, to his daughter's sons without consent of the male collaterals is valid.³ A gift to a *khana-damad*, to be effective, must be made to an actual *khana-damad* and not to a mere intended one. So where a sonless proprietor, among the Waraich Jats of Gujarat, made a deed of gift in favour of his granddaughters and stated therein that he intended to make their husbands *khana-damads*, it was held that the said gift was, by custom, invalid. Mere assertion in the deed by the donor that he intended to make the husbands *khana-damads* at a future date was not enough to entitle the donees to succeed as against the reversioners.⁴

Among the Banda Rajputs of the Ludhiana city, according to custom, gifts of ancestral property to daughters in the presence of near male collaterals are prohibited. But such prohibition does not extend to self-acquired property.⁵ There is no special custom among the Hatars of Shahpur, by which a Hatar can make a valid gift of ancestral property to his son-in-law to the prejudice of his sons. It should be noted that the institution of *khana-damad* is not recognized in the Shahpur district.⁶ According to custom prevailing among the Naru Rajputs, in the Amballa district, collaterals of a childless male proprietor succeed to ancestral land left by him in preference to his daughters.⁷

In a case where the donor died three days after making the gift in favour of his daughters and did not give the donees possession of the property, subject of the gift, and the donees were not under his guardianship at the time of

¹ *Khuda Yar v. Patte* 8 P. R. 1906.

⁴ *Ghulam Mahomed v. Gauhran* 28 P.R. 1905.

² *Amir Khan v. Ruri* 14 P. R. 1906.

⁵ 12 P.R. 1901.

³ *Nizam v. Gauhara* 17 P. R. 1906.

⁶ 14 P.L.R. 1902.

⁷ 36 P. R. 1905.

making the gift, it was held that according to custom the donees not being entitled to succession to any part of the property in dispute and the gift not being accompanied or followed by possession, the gift was invalid.¹

To a sister
and sister's
son.

A gift of ancestral property to sister's son among the Sheik Jiwanas of the Shahpur district to the exclusion of his heirs-at-law is valid.² But among the Dogars of Ferozepur, a gift of ancestral property by a childless male proprietor in favour of his sister's husband in lieu of services was held to be invalid by custom. It was observed that his services otherwise sufficiently compensated, were not the services of a *khana-damad* or the filial services of a step-son. It cannot, therefore, be validated on the ground that the proprietor being crippled stood in need of help in managing his lands, and the donees assisted him.³ In *Hayat v. Hidayat*⁴ the defendant failed to prove that the childless male proprietor was competent to alienate his ancestral property by will in favour of his sister's son as against the rights of his nephew. Similarly in *Ilahia v. Qasim* it was not substantiated that among the Arains of Jullundar a childless male proprietor could alienate his ancestral property to his sister or sister's son to the exclusion of his collaterals.⁵ The will of a Jat proprietor in favour of his sister's son is valid by custom.⁶

To a brother
or nephew.

A gift to a brother or nephew is often permitted.⁷ Among the Gujaros in the Jhelum district a gift by a sonless proprietor to a nephew, son of one brother, and a grand-nephew, grandson of another brother, in consideration of services rendered by the donees to the donor, was valid according to custom.⁸

¹ 44 P.R. 1902 : s.c. 36 P. L. R. 1902.

⁶ 12 P.R. 1877.

² *Sher v. Alam Sher* 94 P.R. 1905.

⁷ 43 P. R. 1884, (Mahomedan Jats of Gujarat) ; 39 P. R. 1886, (Koreshis of Jhang).

³ 55 P.L.R. 1905.

⁸ *Nur Hussain v. Ali Sher* 33

⁴ 40 P.L.R. 1905.

⁹ P.R. 1905.

⁵ 24 P. R. 1905.

The rule restricting the right of a male proprietor to alienate ancestral land in the presence of sons is even more universal in customary law than that of limiting the power of alienation of childless male owners to the prejudice of agnates. He cannot make a gift of his ancestral property to his son-in-law to the prejudice of his sons.¹ In the Awan tribe of Shahpur, a father has no power to distribute his ancestral property among his sons unequally and disinherit a lawful son.² But in *Habibulla v. Habibulla*,³ it was found that custom authorized a proprietor to make an unequal distribution of his property among his sons by gift or otherwise. The Chief Court said that the principle which should be applicable to such cases was that whilst one son may be preferred at the pleasure of the father, he must not be unduly preferred so as practically to disinherit his brethren.

A childless proprietor or his widow has no power by custom to make a gift of ancestral property in favour of one of the collaterals of the proprietor without the consent of others.⁴ By custom prevalent among the Mair Manas of the Jhelum district, a childless proprietor is not entitled to alienate, by gift or will, ancestral property to the prejudice of his agnates.⁵ But in *Punnu Khan v. Sandal Khan*⁶ it was found that by custom prevailing among the Naru Jats of the Jullundar district a childless male proprietor has power to make a gift of his ancestral land at pleasure in favour of one of his agnatic heirs to the prejudice of others, if there is a special connection between him and the donee, such as association with, and service by, the latter, and grounds of like nature.

Among the Mahomedan Rajputs in the district of Hoshiarpur, the widow in possession can, by local custom,

Male proprietor's power to alienate

Widow's power to alienate.

¹ *Sharaf v. Jowala* 114 P. L. R. 1902.

² 62 P. R. 1903.

³ *Meher Khan v. Karam Ilahi* 13 P.R. 1902.

⁴ 70 P.R. 1901.

⁵ 50 P.R. 1902.

⁶ 92 P.R. 1904.

make gifts to resident son-in-law.¹ In the same district a gift by a Mahomedan widow in favour of a relative of her deceased husband was held to be valid.² A gift by a widow to a nephew of the deceased husband, who lived with the latter from his infancy, and had been recognized as an adopted son was upheld by the Chief Court observing that it did not accept the proposition absolutely that a Mahomedan widow of Gujarat could make a gift for a period longer than her own life.³ In another case from the same district a gift to a daughter and son-in-law in accordance with the provisions of the village *Wajib-ul-urz* was upheld by the Chief Court.⁴

A mortgage by a Mahomedan widow, in the Jullundar district, was upheld on the ground that custom sanctioned the exercise of such a power without reference to the question of actual necessity.⁵

¹ 268 of 1873.

¹ 1306 of 1872.

² 1371 of 1873.

³ 884 of 1869.

⁴ 1082 of 1871.

CHAPTER XIII.

TENANCY CUSTOMS.

The Rent Law Commissioners in their report stated : "The mode of proving custom is not very well understood in this country, and, unfortunately, notwithstanding a *dictum* of Sir Barnes Peacock to the contrary,¹ an idea got to prevail that Act X had superseded all customs, and was intended to do away with all agricultural rights, except those specially mentioned and provided for in the Act. We believe there are many local customs in this as well as in every other country, well-understood by the people, recognized by the landlords, and susceptible of proof in the Courts of justice, and we think it very desirable to make it clearly understood that the Bill is not intended to interfere with any of these, unless they have been expressly rescinded by, or are clearly inconsistent with, its provisions."² The provisions of section 183 of the Bengal Tenancy Act are based on the above views of the Rent Law Commissioners. Under this section "custom, usage or customary right" will prevail over the provisions of the Bengal Tenancy Act, provided the custom, usage or customary right is not inconsistent with them, or is not expressly or impliedly modified or abolished by any other section of the Act.

The framers of the Bengal Tenancy Act have not defined the terms "usage" and "local usage" or explained within what period they may be established. A usage may grow up and be formed, (comparatively speaking) in a much shorter period than a custom which must be in existence from time immemorial in order to be recognized.

¹ *Vide Thakurani Dasi v. Bishe-* • 29 ; See Act X of 1859.

shar Mookerjee B. L. R. 202 p. ² *Vide Rent Law Commissioner's 326 (F. B.) [1865] : s. c. 8 W. R. Report, p. 12.*

In *Edward Dalgliesh v. Sheikh Guzaffar Hossein*,¹ their Lordships said: "We feel bound to say there is a great difference between a 'custom' and a 'usage,' and that clearly the latter may be established in a much less period of time than a custom of the transferability of occupancy holdings. We are not prepared to say how long a period must elapse before such a usage can grow up, but we may say that, seeing that more than 12 years have elapsed since the passing of the Tenancy Act, we do not think the Subordinate Judge is right in saying that no new usage can have grown up since that time." From these observations it would seem that the word 'usage' in section 183 of the Bengal Tenancy Act may include what the people have been for a few years past in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists, there would be 'usage' within the meaning of that section.

The 'usage' to which sections 178 and 183 refer is not restricted to usage existing at the time of the passing of the Act but includes usage which may have subsequently grown up.²

Non-agricultural lands:
their transferability
before T. P.
Act.

Previous to the passing of the Transfer of Property Act,³ non-agricultural lands might or might not have been assignable; and if evidence was given that such tenures were, by the custom of the country, transferable, Courts would allow their transfer.⁴ Now, under section 108 cl. f of the said Act there can be no question about the transferability of lands not used for agricultural purpose.⁵

¹ 23 Cal. 425 (1896); S. C. 3 C. W. N. 21 (1898). ² *Krishna Mookerjee* 7 B. L. R. 152 (1868).

³ *Ibid.*

⁴ Act IV of 1882.

⁵ *Beni Madhub Banerjee v. Jai*

⁶ *Hari Nath Karmakar v. Raj Chunder Karmakar* 2 C. W. N. 122 (1897).

To establish that occupancy holdings are transferable in accordance with local usage, it is necessary to adduce evidence of purchase or transfer by persons other than the landlords made with the knowledge, but without the consent, of the latter, and to which no objection was made by the latter.¹ It is not enough to prove that several cases of transfer of such holdings have actually taken place.² The mere finding of a Court that tenants do transfer their rights of occupancy without the landlord's consent does not in itself establish a usage affecting the right of the landlord to accept, or to refuse to consent to, such transfer.³ Where there is a custom to the effect that the transfer of occupancy rights is not valid except on payment of certain fees or *nazarana* to the landlord, evidence of payment of such fees is necessary for the validity of the transaction.⁴

A transfer of occupancy holding cannot be justified by local usage which is still growing up. The usage should have fructuated into maturity and a long period of time must elapse before a custom of transferability of occupancy holding can grow up.⁵ Where the usage of transferability of occupancy holdings is proved to have been growing up in *putties* other than that of the plaintiff-landlord, the latter can retard the growth of the usage in his *putti*, which is a separate estate, by refusing to acknowledge the validity of transfer in his *putti*.⁶ The transfer of a portion of an occupancy holding is contrary to the spirit, if not to the letter, of section 88, of the Bengal Tenancy Act, and the existence of a custom in a particular place by which

Transferability of occupancy holdings.

¹ *Dalgleish v. Sheik Guzaffer Hossein*, 3 C. W. N. 21 (1898); *Ramhari Singh v. Jubber Ali Meah* 6 C.W.N. 861 (1902). See also *Ibid* 181; *Jagun Prasad v. Posun Sahoo*, 8 C. W. N. 172 (1903).

² *Ramhari Singh v. Jubber Ali Meah* 9 C. W. N. 861 (1902).

³ *Radhakishore Manikya v. Ananda Pria*, 8 C.W.N. 235 (1903).

⁴ *Sibosundari Ghose v. Raj Mohun Guho* 8 C. W. N. 214 (1903); *Radhakishore Manikya v. Ananda Pria*, *Ibid.* 235.

⁵ *Ramhari Singh v. Jubber Ali Miah*, 6 C.W.N. 861 (1902); *Jagun Prasad v. Posan Sahu*, 8 C. W. N. 172 (1903)

⁶ *Jagun Prasad v. Posun Sahoo* 8 C.W.N. 172 (1903).

such a holding is transferable is immaterial and gives no right of transference as against the landlord.¹

Whatever might have been the law on the subject, now under section 183, illustration (1) a transfer of right of occupancy, in accordance with usage, is valid even without the consent of the landlord. In these cases it would be necessary either to prove the existence of the usage on the landlord's estate, or that it is so prevalent in the neighbourhood that it can reasonably be presumed to exist in that estate.²

Non-occupancy holding : its heritability.

A Full Bench of the Calcutta High Court, by a majority, has laid down that the right of a non-occupancy *raiyat* has not been made heritable by the Bengal Tenancy Act, but if such right was heritable at the time of the passing of that Act, it has not been taken away by it. Geidt J., in this case, held that apart from custom or contract, the right of a non-occupancy *raiyat* was not heritable.³

Incidents of occupancy rights : cutting trees.

The property in trees growing on land is, by the general law, vested in the proprietor of the land, subject to any custom to the contrary. Under section 23 of the Bengal Tenancy Act, a *raiyat* with a right of occupancy may cut down trees on his land without his landlord's consent unless there be a custom to the contrary, of which it is for the landlord to give evidence. The *onus* is on the landlord to show that a tenant with occupancy right is debarred from cutting down the trees on the land, and not on the tenant to prove a custom giving him a right to do so. The right to appropriate them when cut down, however, is a different question.⁴

¹ *Kuldip Singh v. Gillanders Arbuthnot*, 26 Cal. 615 (1899). See also *Tirthanund Thakoor v. Mutty Lall Misser* 3 Cal. 774 (1878).

² *Palakhari Rai v. Manners* 23 Cal. 179 (1895).

³ *Lakhan Narain Das v. Jainath*

Panday 34 Cal. 516 (1907); s.c. 11 C.W.N. 626.

⁴ *Nafar Chunder Pal Chowdhuri v. Ram Lal Pal* 22 Cal. 742 (1891). *Samsar Khan v. Lochin Dass* 23 Cal. 854 (1896).

In the case of *Nafar Chunder Ghose v. Nand Lal Gossyamy*¹ it was found that by the custom of some zemindari, the zemindar was entitled to recover only one-fourth share of the value of the trees cut down by *raiylats*, when the *raiylats* had them cut down without his consent or permission. A different rule prevails with regard to the fallen wood of self-sown trees in the N.W. Provinces. Under the rulings of the Allahabad High Court, a zemindar claiming a right to the fallen wood of such trees must prove some custom or contract, by which he is entitled to such wood, there being no general rule in India to the effect that there is a right in the landlord or a right in the tenant by general custom to the fallen wood or self-sown trees.² Where occupancy *raiylats* are by the custom of the zemindari entitled, after obtaining the permission of the village *barua* (headman) to cut down and appropriate *agacha* (valueless) trees for fuel, the zemindar cannot succeed in a suit for damages for cutting the *agacha*, unless he can show what the custom is.³

When an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor (*i.e.* the occupancy-tenant) is entitled, under section 244 of the Civil Procedure Code (Act XIV of 1882) to raise the question as to whether the holding is saleable according to custom or usage, and to have that question determined by the Court executing the decree.⁴

A *raiylat* admitted to possession by only some of the share-holders of a joint undivided estate may be ejected by the others as a trespasser unless there is some local custom to the contrary.⁵

Saleability of
occupancy
holding in
execution of
decree.

Holders of
joint undivid-
ed estate and
a *raiylat*.

¹ 22 Cal. 751 note (1894).

² 23 Cal. 854 (1896).

³ *Nathan v. Kamla Kuwar* 13 All. 571 (1891); see also *Badam v. Ganga Dei* 29 All. 484 (1907).

⁴ *Majed Hossein v. Raghubeer Chowdhry* 27 Cal. 187 (1899).

⁵ *Samsar Khan v. Lochin Dass*

⁵ *Goneshram Singh v. Ranjit Singh* 1 Wyman, Part II, 2 (1865).

Payment of
putnee-rent.

It is contrary to the usage of the country for a *putnee-dar*, to pay his rent by monthly *kists* without a special agreement for that purpose.¹

Gorabundi
tenure : its
transfer-
ability.

In *Mohunt Chaturbhuj Bharti v. Janki Prasad Singh* where a purchaser of *gorabundi* tenure from its former holder claimed to be entitled to the possession of the lands comprising the tenure, it was held that the claimant must prove that such lands were transferable and the *onus* lay upon him.²

Mokurari
istemrari.

The words *mokurari istemrari* do not in their lexicographical sense primarily imply any heritable character in the grant, as the term *mourasi* does; but they imply permanency from which, in a secondary sense, such heritable character might be inferred, it being always doubtful whether they mean permanent during the life-time of the grantee or permanent as regards hereditary character. These words do not *per se* convey an estate of inheritance but such an estate can be created without the addition of any other words, the circumstances under which the lease was granted and the subsequent conduct of the parties being capable of showing the intention with sufficient certainty to enable the Court to hold that the grant was perpetual. The rule is perfectly general and is not subject to the qualification that it is by local custom the meaning of the term is restricted.³

Removal of
buildings
during conti-
nuance of
lease.

According to the usages and customs of the country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. It has accordingly been laid down as a general rule that, the person who makes the improvement, if he is not a mere trespasser, but is in possession under any *bond fide* title or claim of title,

¹ *Joykissen Mookerjee v. Jankee Nath Mookerjee* 17 W. R. 471 (1872).

² *Narsingh Dyal Sahu v. Ram Narain Singh* 30 Cal. 883 p. 892 (1903).

³ 4 C.L.R. 298 (1879).

is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.¹

In *Parbutty Bewah v. Woomatara Dabee*, the plaintiff who rented certain land of the defendant in Calcutta and at the time of renting such land purchased from the out-going tenant, with the knowledge of the defendant, two tiled huts which were then standing thereon, contended in a suit of ejectment that "it had been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff, erected upon the land let to such tenants, and such huts were by such practice treated as the property of the tenants, who, by such practice, were in the habit of disposing of them without the consent of their landlord." The High Court held that according to the practice stated and proved by the plaintiff, he was entitled, before giving up possession of the land, to pull down and remove the tiled huts.² Both under the Hindu and Mahomedan law, (as well as under the common law of India), a tenant who erects a building on land let to him can only remove the building and cannot claim compensation for it on eviction by the landlord.³

According to the general custom of the N.-W. Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zemindar to build a house for his

Abadi:
buildings.

¹ In the matter of petition of (1903).

Thakoor Chunder B. L. R. Supp,
Vol. 595 at 598 (1868); *Ismail Khan Mahomed v. Jaigun Bibi*,
27 Cal. 570 p. 586 (1900); *Ismai Kani v. Nazar Ali*, 27

² 14 B. L. R. 201 (1871). See also *Dayalchand Laha v. Bhoyrub-nath Kettry*, Coryton 117 (1864).

³ *Ismai Kani v. Nazar Ali*, 27 Mad. 211 (1903).

occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zemindar, he has, unless he has obtained by special grant from the zemindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house.¹ But if there are circumstances which amount to an acquiescence on the part of the zemindar, then he, the zemindar, cannot compel the tenant to remove the building nor can he himself claim the same.²

It is undoubtedly the rule in the N.-W. Provinces that a tenant is given a room or house in the *abadi* to live in during the existence of his tenancy ; and such a tenant cannot be ejected from the room or house during the continuance of his tenancy.³ Apart from any custom recorded in the *Wajib-ul-urz* forbidding a tenant to transfer the site of a house occupied by him in the *abadi*, a tenant has not, in the absence of a special custom or contract giving him such a right, any right to transfer the site of his house in the *abadi*.⁴

Digging wells.

Any rule which prohibits a tenant from improving his holding is one which, on grounds of public policy, Courts are bound to restrain within its strictest limits. Thus where a zemindar insists on his right to prohibit the construction of *kucha* wells, he should be required to prove that the right claimed by him customarily exists in the

¹ *Sri Girdharji Maharaj v. Sen*, 27 All 338 (1904).
Chote Lal 20 All. 248 (1898); dissenting from Aikman, J., in *Raj-narain Mitter v. Budh Son*, 27 All. 338 (1904).
² *Raj Narain Mitter v. Budh* (1905).

³ *Nazir Hasan v. Shibba*, 27 All. 81 (1904).
⁴ *Bhajan Lal v. Muhammad Abdus Samad Khan* 27 All. 550 (1905).

estate.¹ A tenant with a right of occupancy, who failed to show that he had a right by custom or otherwise, to construct a well without his landlord's permission is not justified in constructing one and thereby infringing his landlord's rights on the plea that he built it for the use of himself and other residents of the village.² Where tenants from year to year, with permission of the landlord, sank wells in the land demised, they are not entitled, under the Hindu law, to any compensation therefor from the landlord after the determination of the tenancy.³ Where a cultivator is in the habit of digging wells to irrigate his field, described as irrigated *chahee*, and, from the practice which had arisen under the old proprietor, the consent of the zemindar had not been thought necessary, the cultivator is entitled to insist upon his old right until by a new contract the old terms of his holding are superseded.⁴

In Madras *raiyats* with rights of occupancy possess in their lands a heritable and alienable interest of a permanent character, but not the sole interest. The landlord is interested in maintaining the saleability of the holding and, in protecting such interest, he is entitled to restrain fruit-bearing trees,⁵ but the landlord cannot recover damages from tenants having *kudivaram* right in perpetuity, for cutting down *babul* trees.⁶ A *raiyat* holding lands in a zemindari on a permanent tenure, would, as regards land on which a money assessment is paid, be *prima facie* entitled exclusively to the trees thereon. Where the crops are shared between the *raiyat* and zemindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or con-

Occupancy
rights in
Madras.

¹ *Sheo Churu v. Ramjeethun*, 3 N. W. P. H. C. R. 282 (1871).

² *Skinner v. Mahtab*, 4 N. W. P. H. C. R. 160 (1872).

³ *Venkatanaragappa v. Thirumalai*, 10 Mad. 112 (1886).

⁴ *Mamomed Fyz-ood-deen v. Imrul*, 3 Agra H. C. R. 285 (1868).

⁵ *Bodda Goddeppa v. Vizianagram*, 30 Mad. 155 (1906).

⁶ *Narayana Ayyangar v. Orr*, 26 Mad. 252 (1902).

tract to the contrary.¹ In the absence of local customs, tenants are not entitled to convert land under cultivation into a mangoe grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.²

*Mirasidars
in Madras.*

In Madras a custom that some only of the *mirasidars* of a village should bind the co-owners of the village lands is valid.³ It can by no means be laid down as a uniform rule that *mirasidars* are entitled to dues from cultivators holding lands within the area of the *mirasi* estate under *pollas* from the Government. To avoid injunction, where the right is denied, there should be an inquiry whether by custom it prevails on the estate, or if there are not sufficient instances on the estate to afford grounds for decision, on similar estate in the neighbourhood. There has been no law depriving *mirasidars* of any privilege they may have customarily enjoyed.⁴

Whatever right of permanent tenancy a tenant may, by prescription, acquire as against an *inamdar*, or a *khet*, it would be contrary to the custom of the country and to the nature of the *mirasi* tenure to hold that he could acquire such a right as a *mirasidar*.⁵

*Right of
occupancy in
Assam.*

*Pikes : their
rights and
privileges.*

The customary law of Assam about the rights and privileges of the *pikes* under the old Government as it appears from the report of Major Jenkins, dated the 13th November, 1849, is that "under the ancient Government of the country, the *pike* system prevailed in Assam ; that the *pikes* had lands assigned to them in lieu of service ; that, latterly, they had generally to serve for one-third of the year, or, such as were not field-labourers, had to give so much cloth or gold or other article which they were

¹ *Kakarlu Abbayya v. Roja Venkata*, 29 Mad. 24 (1904).

⁴ *Salkaji Rau v. Latchmana*, 2 Mad. 149 (1880); *Shieantha v.*

² *Lakshmana v. Ramchundra, Nattu Ranga*, 26 Mad. 371 10 Mad. 351 (1887).

(1902).

³ *Anandayyar v. Dicarajayyan*, 2 Mad. H. C. R. 17 (1864)

⁵ *Norajan Visaji v. Lakshuman*, 10 Bom. H. C. R. 324 (1873).

employed to produce; that besides the lands granted in lieu of service, the *pikes* were allowed to hold the village-barri-lands without limitation as to extent and free of all direct imposts; that these lands descended from father to son, divisible amongst the children according to the custom of the country; that they could give the lands away by 'gifts or will, or by mortgage but all the *pikes* throughout the country paid a capitation tax in lieu of, or as equivalent to, a rent for these lands;' that when personal service was not required from a *pike*, he paid certain rent; that in consequence of the exemption of slaves from taxation, and the 'plague of poll tax,' and personal service, many *pikes* were content to call themselves slaves, and concealed themselves amongst the families of slaves who could protect them; and this resulted in extensive cancellation of *pikes*; and that Mr. Scott, who held the office of Commissioner under the British Government, instituted inquiry, and the result was that a very large number of persons were restored to the rank of *pikes*. The report further states that "the *raiayats* are now considered to have full proprietary rights in all their lands of all descriptions, and the *pikes* are no longer liable to arbitrary interference of any Revenue Officer and no *raiayat* could be dispossessed of any portion of his land except by the regular process of the civil court. They can, of course, sell any portion of their lands, for, though the Government withheld from yielding to them a proprietary right in the *pike* land, yet the *raiayat* can dispose of his right of occupancy. The Government have foregone their right to interfere and no other authority has any power."

"The estates in Assam of all descriptions and sizes, are, more or less, freehold and held subject to the only one condition of paying the Government tax on the land, and all the occupants are with little exception free-holders."

The tenants of *lakhrajilars* are "to all intents, free-holders also, for they were transferred by the Government

of the country with their lands, and all that the Government surrendered was the right to the services of the *pikes*. The lands they occupy are as much their own as if they were held under Government and they are not restrained from throwing up these lands and leaving the *lakhrajdars* whenever they choose, but the abandoned lands would belong to the *lakhrajdars*, or, if sold to other *raiylas*, those would have to pay rent to the *lakhrajdars*.¹

*Zabita-
batta..*

A claim by a zemindar against his farmer for a sum of money alleged to have been realized by the latter from the tenantry under the head of *zabita-batta* or customary levy of an excess of half anna in the rupee, and stipulated to be payable to the zemindar, is illegal and cannot be maintained.²

Russum.

A suit for *russum* (a proprietary due), not claimed as rent, nor under a contract, but by custom payable by cultivators in occupation of the land, either as proprietors or *raiylas*, is not of a nature triable by a Small Cause Court.³

*Bhagdari
tenure in
Broach.*

The custom, in Broach district, of male first cousins succeeding to property held on the *bhagdari* tenure, in preference to daughters or sisters, will, under Bombay Regulation IV of 1827, section 26, take precedence of the Mahomedan law.⁴

Bombay
Revenue Sur-
vey Act I of
1865 : usage.

Before the passing of the Bombay Revenue Survey Act⁵ by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him. This usage might be limited or varied by special contract.⁶

¹ *Dinobandhu Serma v. Badia Koch*, 15 Cal. 100, 102, 103 (1887).

² *Radha Mohun Serma Chowdry v. Gunga Pershad Chuckerbuttee*, 7 S. D. Sel Rep. 142 (166) [1843].

³ *Ebrahim Saib v. Nagasmai*

Gurukal 3 Mad. 9 (1881).

⁴ *Bai Kheda v. Dasm Sale*, 5 Bom. H. C. R. A. C. J. 123 (1868); see *Supra* pp. 265, 404.

⁵ Act I of 1865.

⁶ *Dulia Kasam v. Abramji Sale* 8 Bom. H. C. R. A. C. J. 11 (1870).

Managing
khot.

In the absence of evidence of custom rendering the act of one sharer in a *khotship*, (which act involved the sacrifice of important rights) binding upon his co-sharers, a managing *khot* has, without the assent of his co-sharers, no power to give up rights which belong to them as well as himself.¹

The words *birt zemindari* import the transfer of merely a sale of proprietary right under the Oudh Estates Act I of 1869.²

The words "justly liable" in section 4 cl. (1) of Regulation XI of 1825 indicate an intention on the part of the Legislature that the rent payable for an alluvial increment shall be settled with reference to the circumstances of each particular case, regard being had to the agreement between the parties in respect of the original tenure, where there is such an agreement, and where there is no such agreement, to any usage proved to be applicable to such tenure.³

A custom that if a tenant ceased to pay rent for land which was submerged, when it appeared the zemindar was entitled to possession, the tenant's right abating, is opposed to the provision of section 34 (b) of the N.-W. P. Rent Act XII of 1888, and is therefore not a valid custom.⁴

Although the High Court has under the Hindu law admitted the right of a disciple to succeed to the effects of an ascetic, it may be a question whether the Court does not go beyond the law when it permits a disciple to succeed to the property of an ascetic who leaves a large or any property which, if he conformed to the spirit of his religion, he could not have acquired. But however

Birt zemindari.

Alluvial accretions : rent.

Ascetic's right of occupancy.

¹ *Collector of Ratnagiri v. Vyan-katrav*, 8 Bom. H. C. R. A. C. J. 1 (1871).

² *Gauri Shanker v. Maharaja of Bulrampur*, 4 Cal. 839 p. 853: s. c.

⁴ Shome (Notes) 1.

³ *Golam Ali Chowdhry v. Kali Krishna Thakoor* 8 C. L. R. 517 (1881)

⁴ *Kupil Rai v. Radha Prasad Singh* 5 All. 260 (1883).

this may be, a tenant right of occupancy is on a different footing from property which is exclusively the estate of a deceased ascetic; and the principles which govern the hereditary right of succession to a tenant right of occupancy are such as an ascetic, if he conform to the spirit of his religion, cannot carry out.¹

Auction sale
of *raiyat's*
right.

An auction purchaser of a *raiyat's* right and interest in his house in a village could not acquire more title than could have been transferred by private sale. It is necessary in such cases to inquire whether according to the village custom the *raiyat* was competent to alienate the house with its site without the permission of the zemindar.²

Koraree
raiyat.

Long continued family possession constitutes a *koraree raiyat* in Goalparah.³

Adimaya-
vana in
Malabar.

In case of *adimayavana* tenure, the land is made over in perpetuity to the grantee either immediately as a mark of favour or on condition of certain services being performed. The terms *adina* and *kudima* mean a slave or one subject to the landlord, the grant being generally made to such persons. The land bestowed as a mark of favour can never be resumed but where it is granted as remuneration for certain services to be performed, the non-performance of such services involving the necessity for having them discharged by others, will give the landlord power to recover the land.⁴

Pasture-land.

According to the ancient law and custom of this country a portion of the land of every village is kept apart from the use of the villagers as pasture ground. It is common pasturage of their cattle. But as soon as any portion of the land is made culturable, it becomes a part of the *raiayati* lands of the village. There is seldom a village in Bengal which has not a large piece of

¹ *Sovruj Komar Pershad v. Alukhee Dasee 4 Sevestre 347 Mahadeo Dutt 5 N.W.P.H.C.R. (1856).*

² *Shib Lall v. Lochun Singh 3 Calicut 27 Mad. 202 (1903).*

³ *Theyyan Nair v. Zamorin of Ag. (Rev. Ap.) 7 (1868).*

land attached to it for the grazing of the cattle of the village.¹

Under *dona bundee* system there is a cursory survey or a partial measurement of a field or weighment of the crop, to ascertain the value of the crop and the amount of the assessment. Under *agorëbuttuë* system there is a division of the crop immediately after reaping between the cultivator and the Government, the latter taking half the produce in kind. The division of the crop is in predetermined proportions between landlord and tenant. The term literally means a watching and sharing; each party keeping a watch over the fields, so that none of the crops may be fraudulently made away with.²

The Bengal Tenancy Act does not expressly lay down any rule of law with respect to acquisition of either occupancy or non-occupancy right in land held by Ghatwals as service tenures. Section 181 of the Act lays down that nothing in it shall affect any incident of a Ghatwali or other service tenure. The growth of such rights would seem to be inconsistent with the nature of service tenures, but a custom or local usage might grow up in any local area as to recognition of occupancy rights and such a custom might be binding on successive Ghatwals.³

A *mul-raiyat* is a village headman or settlement holder whose rights are in their entirety transferable, saleable and attachable. These rights are, (i) to enjoy rent-free *man-land* i.e. service land, if any, of the village official; (ii) to collect commission on rents from landlords and *raiylats*; (iii) to enjoy his *nij-jote* land at the same rates of rent as apply to other *raiylats*, or to lease them out on settlement rates, in which latter event, they cease to be *nij-jote* lands, and (iv) to assess at half rates all waste

Donabundee.
Agorëbuttuë.

Ghatwali
tenure.

Mul-raiyat
& *Mustogir*
in Sonthal
Pargannah:
their rights.

¹ *Sheik Milan v. Mohamed Ali* Poorunder Mahaton 8 Sevestre, 10 C.W.N. 434 (1903). See also Part IV 23 (1866). *Manu*, Ch. VIII. 231.

² Reg. II of 1795 of the Bengal Code. *Chhutterdharee Mahaton v.* * *Mohes Majhi v. Ban Krishna* Mandal 1 C.L.J. 138 (1904).

and jungle lands reclaimed by the *raiyats* or to enjoy rent-free what he himself reclaims. It is well settled that the privilege which the *mul-raiyat* possesses of transferring his tenure must be exercised in respect of the whole tenure at the same time *i.e.*, if he chooses to transfer his tenure, he must alienate the whole of his rights in the village including his right of managing the village and collecting the rent as also his right to the land in his possession. He cannot split up the tenure, so as to part with a portion and retain the remainder.

The rights of a *mustagir* headman are (i) to reclaim and cultivate the waste lands in the village without paying rent, or to settle such lands at half rates with the other *raiyats* (the half rates going into the headman's own pocket); (ii) to hold at his option in his own possession or to settle with others, the *jotes* of absconded *raiyat*; and (iii) to receive a fixed commission on the rent collections from the *raiyats* and an equal sum from the Ghatwal or zemindar, the headman's *nij-jote* lands being assessed with rent like the other lands of the village. It is therefore not quite accurate to say that the right of the *mustagir* is absolutely restricted to the collection of rent from ordinary *raiyats*.¹

Darbari Panjiara v. Beni Rai 2 C.L.J. 77 (1905).

CHAPTER XIV.

TRADE CUSTOMS.

Customs and usages of trade are customs prevailing in particular trade or business¹. Such customs or usages may not only annex terms to a contract which is not inconsistent with them but may also control the interpretation of a contract which is complete in itself but which contains terms used in a technical sense.²

The *lex mercatoria*, although adopted as part of the Common Law of England, is not part of the law by which transactions are governed in those parts of India, into which the common law of England has not been introduced.³ Thus the law of merchant is not applicable to banking transactions in the muffasil.⁴ Sir Barnes Peacock, C. J., said :—"Some question has arisen as to the law applicable to this case, and whether the Court is to determine the rights of the parties by the *lex loci rei sitae*, or by the English law. It will be unnecessary for the Court to determine that difficult question, as the only law in the muffasil which would regulate a case like this, consists in those principles of equity, justice and good conscience according to which, by Regulation VII of 1830, the muffasil Courts are bound to decide. If that equity, justice and good conscience are the same as the law of England, common law and equity united, it is unnecessary to decide whether we are to administer English law or the principles of Regulation VII of 1830."⁵

Lex mercatoria.

¹ *Goodwin v. Roberts* L.R. 10 Ex. 76, 337 (1875).

p. 346.

² Sweet's Law Lex tit. "Custom"

⁴ *Syed Ali v. Gopal Doss* 13 W.R. 420 (1870).

³ *Pigou v. Ramkishen* 2 Sevestre 619 (1863). See observations of Cockburn C.J., *re* law merchant in *Goodwin v. Roberts* L.R. 10 Ex.

⁵ *Per Peacock C. J., in Chooneel Canoria v. Southey* 2 Boulnois 65 at p. 71.

Requisites of
a valid trade
custom.

It can be taken as settled and well-established rule that the legal requisites of a valid trade custom are that it should be certain, invariable, reasonable and lastly, the circumstances of the case must be such as to render it fair and reasonable to presume that the party whom it is sought to affect by the custom had knowledge of it as affecting the particular agreement made by him, and that he made the agreement with reference to it.¹ It must be so notorious that every body in the trade enters into a contract with that usage as an implied term. It must have quite as much certainty as the written contract itself,² and must be so universally acquiesced in that every body in the particular trade knows it or "might know it if he took the pains to enquire."³

Mercantile
customs :
limit of
of control
by law.

Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the courts, of some rule of law to business and which application has seemed irksome to some merchants. And when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be, whether it is in accordance with fundamental principles of right and wrong. A stranger to a locality or trade or market, is not held to be bound by the custom of such locality, trade or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade or market wherein all who are not strangers do know and act upon such custom. When considerable number of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of business. So long as they do not infringe some fundamental

¹ *Price v. Brown* 14 Mad 420, *Nadan* 11 Mad. 459 (1888); 423 (1891). *Juggomohun Ghose v. Manichehand*

² *Per Sir Geo. Jessel M.R. in Nelson v. Dahl* 12 Ch. D. 568 (1879). 7 M. I. A. 263 p. 282 (1859); *Mackenzie Lyall v. Chamroo Singh*

³ *Volkart Bros. v. Vettivelu* 16 Cal. 702 (1889).

principle of right and wrong, they may establish such a custom but if on dispute before a legal forum, it is found that they are endeavouring to enforce such rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law and void. When a custom relied on is so inconsistent with the nature of the contract to which it is sought to be applied as that it would change its nature altogether or as to change its intrinsic character it is unjust as against the party against whom it is set up and so it is void; but if it would not, then the custom will be allowed to prevail.”¹

Hundis are chiefly of two descriptions *viz.*, *shah-jog*, or payable to bearer, and *nam-jog* or payable to the party named in the bill or his order. There are particular formulas for these bills, both as regards phraseology and the mode of attaching signatures and superscriptions. These forms are well-known to Indian commercial people and should be scrupulously observed. A *nam-jog* bill may or may not be accompanied by a descriptive roll of the party in whose favour it is granted. It may be payable at sight or after a certain date, specified in the bill, or fixed by custom of trade. When payable at sight it is termed “durshuni.” It may be cashed with or without security, but when there is a descriptive roll, or when the identity of the holder or payee be known security is not usually required. A *shah-jog* bill is considered payable to any respectable person, who may present it to be cashed. It is payable only after a certain period of usance specified or implied. It is usually cashed on the same condition with regard to security as *nam-jog* bills. Bills of either kind can be endorsed or transferred unless the *nam-jog* bill be accompanied by a descriptive

Hundis

roll, in which latter case a transfer would be inoperative.¹ A *shah-jog hundi* is only payable to a respectable holder and is not equivalent to a *hundi* payable to bearer.² It is not a rule of Hindu law or customary that every one who tenders or presents a *hundi*, for acceptance or payment even though he obtained it by fraud should be treated as a *shah-jog*.³

Distinction
between
shah-jog
hundi and
bill of
exchange.

Shah-jog hundis differ from bills of exchange in one very material circumstance, amongst others, that as a general rule, the acceptance of the drawee is not written across them, so as thereby to give them an additional degree of mercantile credit and to that extent make it just to impose an additional degree of liability on the acceptor; but, as a rule, the particulars are only entered in the drawee's books. It may be added also as a general rule, that *hundis* are very frequently not presented for acceptance before they are presented for payment—before, that is, they are either due or overdue.⁴

Shah-jog
hundi.

The meaning of *hundis* made payable to *shah* or "respectable holder" and the usage in regard to such documents among the Indian merchants in Bombay were very fully considered in *Davalatram Shriram v. Bulakidas Khemchand*⁵ which came up before Sir Joseph Arnold in 1869, and as section 1 of the Negotiable Instruments Act⁶ states that nothing in the Act contained affects any local usage relating to any instrument in an oriental language, unless such usages are excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by that

¹ Maepherson on the Law of Contracts in Courts of India not established by Royal Charter. See *Pigon v. Ram Kishen* 2 Sevete 619 at p. 621 (1863).

² *Bhuputram v. Hari Privo* Coach 5 C.W.N. 313 (1900). *Lalla Mal v. Kesho Das* 26 All. 493

(1904).

³ *Bhuputram v. Hari Privo* Coach 5 C.W.N. 313 (1900).

⁴ *Davalatram Shriram v. Bulakidas Khemchand* 6 Bom. H. C. I. O.C.J. 24 (1869).

⁵ *Ibid.* p 26.

⁶ Act XXVI of 1881.

Act, and where no such words are to be found in the *hundi* in question, the usage proved as well as the decision in that case still hold good in the Bombay Presidency.¹

The general process of cashing *shah-jog hundis* is as follows:—The *shah* or person, who has bought or holds the *hundi*, and whose name must always be endorsed on it before it is presented, sends one of his men to the shop of the drawee, whose *killadar*, after referring to the particulars of advices relating to the *hundi*, which have in due course been previously entered in the *chitti nand* or bill-book, and finding it correspond therewith, thereupon enters in the journal the particulars of the *hundi*, viz., its amount, date, due date, name of *shah*, the person tendering it for acceptance, and whose name is always endorsed on the *hundi*. He then returns the *hundi* to the servant of the *shah*, who takes it back to the *shah's* shop. If the day of presentment be the exact due date, the amount is paid on that very day if the *hundi* is overdue when presented it is generally paid the next day, the reason assigned being that, unless presented on the actual due date, when, of course, its presentation is expected and provided for, the *munim* or principal of the firm may not be present, or there may not be sufficient cash in the hands of the *killadar* to meet the amount. Payment is made by sending the amount by a servant of the drawee to the shop of the *shah*. On receiving the amount, the *killadar* of the *shah* writes an acknowledgement in full on the back of the *hundi* and sends it back to the shop of the drawee by the servant who brought it thence.² According to mercantile usage amongst Hindus where a *shah-jog hundi* is paid at maturity by the drawee to the *shah* or holder of the *hundi*, and such *hundi* afterwards turns out to be forged, the *shah*, though a *bond side* holder for value, is bound to repay to the drawee the amount of such *hundi* with interest from the date of payment

Cashing of
shah-jog
hundi.

¹ *Ganesdas Ramnarayan v. Lachmi Narayan* 18 Bom 570 p. 577 (1894). • ² *Daulatram v. Bulakidas* 6 Bom. H. C. R. O. C. J. 24 (1869).

provided the drawee has been guilty of no laches in discovering the forgery and communicating the fact of such forgery to the *shah*. The *shah*, however, relieves himself from such liability by producing the actual forger.¹ The drawee, in cases of *shah-jog hundi* is bound by custom of Hindu merchants to make enquiries as to the person who presented the *hundi* to him for payment.²

Endorsement
on *shah-jog*
hundi.

There is no rule of Hindu law, customary or otherwise, which would have the effect of making the word *shah-jog* mean payable to bearer, quite independently of the endorsements; nor is there any principle of mercantile expediency, having the force of law or otherwise, which would be served by disregarding the direction of the endorser, and treating a specially endorsed and especially accepted *hundi* as if it were an English negotiable instrument made payable to bearer, and, as such, part of the currency of the country.³

N. I. Act and
custom.

The Negotiable Instruments Act, in the absence of local usage to the contrary, applies to *hundis*.⁴ But no custom can override the terms of a contract as set forth in a *hundi*, nor can a custom, if it is irrational, absurd, and contrary to the principles of equity, be sustained in a Court of justice.⁵

Hundi
payable on
arrival or
at sight : its
time of
presentation.

A *hundi* drawn in Calcutta upon a firm at Jeypore and made payable on arrival at that place was presented after 25 days of its arrival there. It was held that apart from any local usage, by the general law, there was no specific time within which a *hundi* payable at sight or payable on

¹ *Davalatram v. Bulakidas* 6 Bom. H.C.R., O.C.J. 24 p. 31 (1869)

² *Thakurdass v. Futtah Mall*

16 W.R. O. A. 3 p. 15. (1871) : s.c.

³ *Ganesdas Ramnarayan v.*
Lachmi Narayan 18 Bom. 570 p. 579 (1894). See also *Bhuputram v.*

7 B.L.R. 275 p. 304.

Hari Prio Coach 5 C.W.N. 313 (1900); *Lalla Mal v. Kesho Das*

⁴ *Krishna Shet v. Hari Valji* 20 Bom 488 (1895).

26 All. 493 (1904); See s. 10
Negotiable Instruments Act

⁵ *Indur Chander Dugar v.*
Luchmee Bibee 7 B.L.R. 682(1871);
s.c. 15 W.R. 501.

arrival at a particular place is to be presented and that it was presented within a reasonable time.¹

If the drawer of a bill does not, on the face of it, show that he drew the bill as agent, he cannot set up as a defence that he drew the bill as an agent.² In Dacca according to a mercantile usage prevalent there, *gomastas* or agents can draw *hundis* on their principals without disclosing the fact in the *hundi* and, on proof of such agency, the drawer is not liable. Thus, in the case of *Hari Mohan Bysak v. Krishna Mohan Bysak*³ where all the parties to the *hundi* lived in Dacca, the drawers of a *hundi* in favour of the plaintiff were held not liable, on proof that they were the *gomastas* of the acceptor and had no interest in the *hundi* and, according to custom in Dacca where the *hundi* was drawn and accepted, agents are not liable, although the agency does not appear on the *hundi*.

Drawer and
agent : usage
in Dacca.

A person who receives a bill for a particular purpose must apply the same accordingly; and neither he nor any third person "knowing the facts" can, by afterwards receiving the amount, detain the same from the principal.⁴ "If goods or bills are deposited for a specific object and the bailee will not perform the object, he must return them. The property of the bailor is not divested or transferred until the object is performed."⁵ In *Rajroopram v. Budloo* the question whether a *hundi* made payable "to order" was, according to Hindu law and custom of the Indian merchants negotiable without a written endorsement by the payee, was raised but not discussed.⁶

¹ *Mutty Lal v. Chogenmull* 11 Cal. 344 (1885); *Gopal Das v. Seeta Ram* 3 Agra 268 (1868).

(1850). *Rajroopram v. Buddoo* 1 Hyde 155 (1862): 1 Ind. Jur. 93.

² *Pigou v. Ramkishen* 2 W. R. 301 (1865).

⁵ *Buchanan v. Findlay* 9 B and C 738 p. 749 (1829) per Lord Tenterden C.J.; *Key v. Flint* 8 Taunt.

³ 9 B. L. R. App. 1 (1872): 17 W. R. 442. See also *Pigou v. Ramkishen* 2 W. R. 301.

⁶ 1 Hyde 155 (1862): 1 Ind. Jur. 93.

⁴ *Lloyd v. Howard* 15 Q. B. 995

Interest on
hundis.

Where *hundis* upon which a suit was brought were silent as to interest, but it was proved that according to the custom of the district the parties had entered into a collateral agreement embodied in written documents that *hundis* should bear interest at 30 per cent. per annum, it was held by the Privy Council that section 80 of the Negotiable Instruments Act, being an enabling section, was no bar to the recovery of the interest stipulated.¹

Notice by
acceptor to
endorsee.

It is not a custom among *shroffs* to make inquiry of the acceptor of a *hundi* before discounting it, and to abstain from discounting it if the acceptor should recommend the person by whom the inquiry is made not to discount. But it is usual to make such inquiries. A mere notice by the acceptor not to discount, does not affect his liability to a person who takes a *hundi bona fide* and for valuable consideration after such notice.²

Notice of
dishonour.

In the absence of any local usage to the contrary, it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instruments Act should be applied to a *hundi* in the vernacular, the "reasonable time" within which notice is to be given being determined according to the circumstances of the case.³

Notice by
return of
post.

Though the English law of prompt "notice by return of post" does not apply to the *hundis* drawn by natives of India and the drawee and indorser are Indians, yet before holding the indorser or the drawer responsible for the consideration of a *hundi* dishonoured by the drawee some reasonable notice is essentially necessary to be given to the party who may be asked to pay. What notice and in what manner that notice is required to be served should be determined by the custom of the district where the case arises.⁴ A reasonable, not immediate, notice of dishonour

¹ *Gowami Sri Ghanashiam v. Itam Nurain* 11 C.W.N. 105 (1906)

78 (1882).

² *Khosal Chand v. Luchmee Chand*, Bourke 151 (1865).

⁴ *Radha Govinda Shaha v. Chundernath Shaha* 6 W.R. 301 (1866) : s.c. 3 Wyman 6.

³ *Moti Lal v. Moti Lal* 6 All.

is all that the *hundi* law requires.¹ In *Megraj Jagannath v. Gokaldas Mathuradas*, the question as to whether there was a custom that on a fraudulent detention of the *hundi* by any of the parties to it, each endorser was bound to give a *peth* i.e. duplicate of the *hundi*, to his immediate indorsee, was raised but not decided upon.²

According to the usage of *shroff's* when a *hundi* has been lost or stolen, the rightful holder may obtain from the drawer a *peth* or duplicate, and on presentation thereof to the drawee, has a right to payment of the amount, the original not having been already presented and paid, which of course, in the case of a *hundi* payable to *shah* may occur. But there is no customary right to payment on a duplicate when a person to whom a *hundi* has been sold and endorsed, has failed being indebted to the person from whom he had obtained such *hundi*.³

The practice followed by *shroff's* when a *hundi* has been sent down to Bombay for collection and payment is refused, the amount having been already credited to the sender, is that, in general, the *hundi* is returned to the sender, a debit entry against him being at the same time made; but if the banker to whom the *hundi* has been sent for collection does not return it, or make a debit entry against the sender, but allow the amount to remain credit, then he can consider himself a holder for a value.⁴

According to the usage of native bankers at Moorshidabad, interest is claimable on *hundis* drawn at 111 days sight.⁵

The local usage at Bushire is to present the *hundi* for payment at the Bank and for the acceptor to call at the Bank at due date and effect settlement.⁶

Bombay
shroff's prac-
tice.

Moorshidabad
usage.

Bushire prac-
tice.

¹ *Megraj Jagannath v. Gokaldas Mathuradas* 7 Bom. H.C.R. 137 p. 142 (1868); *Gopal Dass v. Secta Ram* 3 Agra 268 (1868).

² 7 Bom. H.C.R. 137 (1868).

³ *Sugan Chand Shirdas v. Mul Chand Joharimal* 12 Bom. H.C.R. 113 p. 118 (1872), on appeal 1

Bom. 23 at 43 (1875).

⁴ *Sugan Chand v. Malchand* 12 Bom. H.C.R. 113 p. 128 (1875).

⁵ *Dhunpath Singh Doogur v. Maharaja Jagput Indur* 4 W.R. 85 (1865) : s.c. 1 Wyman 28.

⁶ *Imperial Bank of Persia v. Futtuk Chand Khubchand* 21 Bom.

When
English
law applies to
hundis.

When the analogy between *hundis* and bills of exchange is complete, and there is no proof of any special usage, it is right to apply the English law to them.¹ Thus, where a bill was made in Calcutta, in the English language, and in ordinary English form, and no special usage was proved, it was held that the English law was applicable to the case.²

Wagering
contract :
interest.

Before the passing of the Act XXI of 1848, where a usage had been established, by which interest was paid upon a wagering contract (opium sale), the Court should allow interest on the principle sum recovered in an action.³ But neither by the English nor by the Hindu law, (unless there be a mercantile usage) can interest be imported into a contract which contains no stipulation to that effect. Thus in an action for a contract known as *tejee-mundee chillees*, (opium wager contracts,) before the passing of the Act XXI of 1848, which prohibited such gambling contracts, the plaintiff claimed interest on the sum recovered. But the Privy Council held that as there was no stipulation as to interest in the contract or satisfactory evidence of mercantile usage at Calcutta to import interest into the contract, the interest claimed could not be allowed.⁴

Tuticorin
usage : cotton
trade.

According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton-press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton-press, who is bound to give the merchant in exchange of cotton of like quantity and quality. Such a transaction is not a sale but an agreement for exchange; and therefore

294 (1896). cf. s.s. 70, 71, 137 Neg.

Ins. Act of 1881.

¹ *Amritram v. Damodar Das*. An unreported case referred to in 2 Hyde 259 p. 261.

² *Sambonauth Ghose v. Jaddownauth Chatterjee*, 2 Hyde. 259 (1861) s.c. 1 Coryton 88.

³ *Juggomohan Ghose v. Manick-*

chand 7 Moo. I. A. 263 (1859).

⁴ *Juggomohan Ghose v. Kaisree-chand* 9 Moo. I A 256 (1862) : s.c. 1 Sevestre 629 and 7 Sevestre 629. See also *Sukajram v. Chaeeton Dass* 1 Tay and Bell 230 (1850). *Doohebdas v. Ramlall* 1 Tay and Bell 253 note. (1850).

when the cotton thus delivered is accidentally destroyed by fire, the loss falls on the owner of the press.¹

A person entered into a contract to deliver certain quantities of cotton, and, having failed, sought to have the price of the amount not delivered fixed at the ordinary market rate. It was found, however, that the transaction, though purporting to be an ordinary contract was in reality of the nature of speculations on the rise and fall of the cotton market and dealt with goods which had no real existence in the market; also, that in such transactions it was customary for the prices to be settled by a skilled committee of merchants engaged in similar transactions. In this case the committee settled a higher rate than that actually prevailed in the market. The Court held that in the absence of proof of fraud either in the inception or in the proceedings of the committee, the decision of the committee is binding on the parties. In order to take part in such speculations in cotton in Bombay, a Bombay merchant is required to employ, as his agent, one of the *khamgaon shroffs* in whose hands, the dealings are and to submit to the conditions governing the trade such as it was.²

Cotton *sutta*
in Bombay.

A *budnee* contract in Furruckabad is a mere wager on the market price goods in a certain date at a certain place. No actual interchange of cash and goods is contemplated in it. Such being its nature, it is illegal and cannot be enforced at law.³

Badnee con-
tract.

The "usage of Mangrolé" appears to have originated in the necessities of the petty commerce carried on for ages in the Indian sea, by means of small open-decked vessels in which the venturers were both so numerous and

¹ *Volkart Bros v. Vettirelu Nadan*, 11 Mad 459 (1888).

P. R. 1866 ; *Chandau v. Ajudhiahan Pershad* S. D. N. W. P. R. March 1861 : *Ramkaran v. Zahira No. 101* P. R. 1868 ; *Rangi Lal v. Ajudia Pershad* 31 July 1874.

² *Pestonji Jehangirji v. The firm of Jaisingdas Hansaraj 8 C. W. N. 57 (P. C.) [1903].*

³ *Krishna v. Hushnuk No. 11*

Usage of
Mangrolé :
Marine
insurance.

individually of so small an amount, that either commerce would have been checked by the absence of insurance or some inexpensive mode must have been adopted by common consent of insurers and under-writers, by which insured losses could be recovered from the latter. The Indian merchants at each port of resort appear to have constituted themselves and to have been received by each other, as agents, for the purpose of looking after their respective interests in sea-risks, whether as shippers or as under-writers. The mutual interest of those merchants to act with good faith towards each other, and the exigencies of commerce reasonably led to such a confidence being placed in the integrity of all acts under their personal cognizance and control, as to allow of their certificate being to that extent received as binding upon both under-writers and insurers. Those acts appear to be the statement of the goods saved and bought into harbour, the undamaged value at the port of distress of the goods appearing on the manifest the *bondā fides* of the sale and amount of proceeds of the sea-damaged goods and the calculation of percentage loss, but the reason of the usage does not require that it should be carried any further.¹

In the case of a policy of insurance expressed to be "according to the usage of Mangrolé" the certificate of the *mahajans* at the port of distress or sale, if accompanied by the manifest of the shipment and the account sales is regarded as sufficient evidence of an average loss and of account of such loss, though the under-writer may answer a claim supported on such evidence by showing fraud on the part of the shippers, the master of the vessel or the *mahajans*. If the under-writer cannot establish a case of actual fraud, he will be bound to pay an average loss according to the certificate of the *mahajans*, supported by the ship's manifest and account-sales at the port of distress.

¹ *Ransordas Bhoghalv. Keerising* 229 p. 231 (1863).
Mohanlal 1 Bom. H. C. R. O. C. J.

Where usage alleged was that the *mahajan's* certificate is deemed to be conclusive evidence against the under-writer without the production of manifest and account sales, and that upon proof of the certificate alone and of the policy the owner is entitled to recover his average loss, the Court declined to give effect to it, being an unreasonable usage.¹

The defendants, carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damages to goods arising from insufficiency of package. The plaintiff shipped certain goods in the defendant's steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay. On their being landed in Bombay it was found that packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages. In an action brought to recover damages in respect of such injury it was held that evidence of mercantile usage or custom would be admissible to show that the words *insufficiency of package* should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade.²

In another case³ where a condition annexed to defendant's bill of lading was that they should not be responsible for "leakage or breakage or other consequences arising from the insufficiency of the address or package," and where packages shipped were proved to be insufficient, it was held that under a bill of lading in the above form, the *onus* of proving that the packages were insufficient and that the injury which they had sustained was the consequence of such insufficiency lay upon the defendants, but when the result of the evidence on both sides was to leave

Insufficiency
of package :
bill of lading

¹ *Ransordas v. Kesrising* 1 Bom. O.C.J. 169 p. 179 (1867).
H. C. R. O. C. J. 229 (1863). • ² *P. & O. S. N. Co. v. Somaji Vishram* 5 Bom. H. C. R. O. C. J. Nasorevanji Padsha, 4 Bom. H.C.R. 113 (1868).

it in doubt whether the injury was caused by negligence, or was the consequence of the insufficiency of the packages, the plaintiff was not entitled to recover damages.

Method of examining jute bales and of ascertaining damages.

In order to find whether the average of a whole consignment of jute is below the guaranteed standard of quality, it is sufficient if only a small sample taken from different portions of the bulk examined to form a judgment as to what the bulk is. It is not usual to examine the whole consignment for that purpose.¹ In a suit for damages for breach of warranty as to the quality of jute supplied, the method of ascertaining damages is established and recognized in the trade. The buyer is entitled to two annas per maund for a deficiency of 5 per cent. of "hessian warp." (In the case of *Boisogomoff v. Nahapiet* 6 annas per maund were allowed.) And it is not necessary for the buyer to show how he has dealt with the jute delivered to him, and whether he has suffered any and what loss by reason of the jute being not up to the warranted standard.²

Common carriers.

The custom of common carriers, which is a "custom of trade" within the meaning of section I of the Indian Contract Act,³ is not affected by its provisions. The Contract Act is not intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with those rules.⁴

Trade name.

Where a custom for sons to carry on business with the name of their father prefixed to their own, to distinguish their own name from other similar names in the country, is set up, it must be strictly proved.⁵

¹ *J. Boisogomoff v. Nahapiet Jute Co.* 29 Cal. 323 (1902) s. c. 6 C. W. N. 495.

² *Ibid.*

³ Act IX of 1872.

⁴ *Moothra Kant Shaw v. I. G. S. N. Co.* 10 Cal. 166 p. 185 (1883).

⁵ *Misrudall v. Ramnarin, 1 Coryton, 63 (1864).*

CHAPTER XV.

AGENCY CUSTOMS.

It is a general rule, that if a person sells goods, suppos- General rule
ing, at the time of the contract, that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject however, to this qualification *viz.*, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor dealing with him and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants and of all persons in trade, the credit is there considered to be given to the British buyer and not to the foreigner.¹ There is no particular custom or usage in Calcutta, qualifying the mercantile law of England as between principal and factor.²

¹ *Thomson v. Darenport* 9 B and 173 p. 175 (1870).

C 78 at 86 (1829); *s. c. Smith's L. C. (11th Edn.) Vol. II. 379 p. 385; Price v. Walker L. R. 5 Ex. ² *Murtunjoy Chuckerbutty v. Cockrane* 10 Moo. I. A. 229 p. 242 (1865).*

Nyanuggur
arath.

There is a custom at Nyanuggur, (under the Judicial Commissioner of Ajmere), according to which a merchant coming from any other district is only allowed to trade in the name and upon that credit of a Nyanuggur firm. The actual dealings are effected by the stranger himself or by his broker, but in each transaction the name of a Nyanuggur merchant is given and his name is entered as the principal in the transaction. Credit is given to him and the final settlement of the transaction is effected with him. He is known as the *arath* or agent. At the conclusion of such transaction a memorandum of it is sent to the *arath* by the person who makes use of his credit. The memorandum is known by the term "panri." If in respect of any transaction the stranger does not deliver "panri" to the *arath* or agent, the *arath* is still responsible for payment to any vendor or third party and the *arath* can sue the stranger who used his name for the recovery of any amount paid by him to the vendor.¹

Agent authorized to collect *hundis*.

An agent, who is authorized to collect *hundis*, and who after acceptance by the drawee gives credit to his principal for the amount, is, by the usage of the *shroff's*, entitled, on the *hundi* being dishonoured by the drawee, to treat himself as a holder for value.²

Kuwa-pucca
bidding by
agent.

An agent at an auction sale made a bid for certain goods, which was not accepted at the time by the auctioneer, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause providing for such procedure. The auctioneers before receiving any intimation from the owners of the goods received a letter from the principals of the agent bidding at the sale, repudiating the contracts on the ground that the agent had no authority to bid for the goods on their

¹ *Samur Mull v. Choga Lall* 6 I. A. 238 p. 242 (1879); s. c. 5 Cal. 421; 1 Shome (Notes) 28. ² *Mulchand Joharimal v. Suganchand Shirdas* 1 Bom. 23 (1875).

behalf. In a suit by the auctioneers for recovering the loss on re-sale of the goods, they set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence given on the point was that of an assistant of the plaintiff's firm who said that "such an agreement had never been repudiated." The Court held that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore no suit would lie.¹

The relation of a *banian* to his employers varies much according to the particular agreement between them, and the practice of the particular house of business. His functions are not always those of a factor, and even where some of his functions are of that nature, there are so many differences between the character of a *banian* and the character of a factor that it would be neither safe nor logical to assert that the rights, and, particularly, the right of lien of a *banian*, must be co-extensive, with that of a factor. Upon goods consigned to merchants here by foreign principals, the *banian* can acquire no lien, beyond his employer's interest in those goods, except in a transaction which falls strictly within the protection of the Factor's Act. To hold otherwise would be to hold that usage could give a lien on the principal's goods, for the general balance due to the *banian* from the factors, whatever might be the state of their account with those principals; that there may be, by operation of law, a lien more extensive than any which the law would permit the parties to give by express contract.² When purchases are made by a *banian*

¹ Mackenzie Lyall & Co. v. * Shibchander Mullick v. Bis-Chumroo Sing 16 Cal. 702 (1889). chaff 1 Boul 311 p. 350 (1858).

on the general account of a European firm, credit, according to general custom, is understood to be given to him, unless there is an express contract by or on behalf of the European firm, to be responsible for the price.¹ There is by no means that uniformity in the relations of *banians* with their employers in Calcutta which would justify the Court in assuming that such relations are regulated by known usages of trade.² A *banian* often, if not generally, advances money to the firm in which he is employed; he gives security. If he sells the goods of the firm he is a sort of *del credere* agent, guaranteeing the payment of the price by the bazar dealers or other purchasers to his principal, and as to purchases he is the direct purchaser in the bazar. "The convenience of all parties has led to a custom of trade, by which credit is given to such persons making small purchases for their masters in the ordinary, well-understood course of their employment and business. But, if they were employed to make large purchases of merchandize, or to enter into contracts not within the usual scope of the authority of persons of such character I know of no custom of trade in the bazar which would justify the court in applying any other than the ordinary rules of law to the case."³

Bill-brokerage.

In *Moran v. Ashburner*,⁴ M & Co. who were known to act sometimes as brokers and also to have other functions, bought a bill of A & Co. as declared agents, entrusted with the funds of a principal in England. They claimed brokerage on the purchase of the bill of exchange, which

¹ *Pallyram v. William Paterson* 2 Boul. 203 (1859); *Grant v. Juggobundo Shaw* 2 Hyde 301 (1863); *Sheikh Faizulla v. Ramkamal Mitter* 2 B.L.R. O.C. 7 (1868).

² *Gobindchunder Sein v. Ryan* 2 Boul. 8 (1859); on appeal 15 M.O. I.A. 230 (1861); *Gonger v. Abhoy Chunder* 2 Boul. 22 (1859).

³ *Grant v. Juggobundo Shaw* 2 Hyde 301 p. 309 *per* Norman C.J. (1863); See also *Pallyram v. William Paterson* 2 Boul. 203 (1859), *Gobindchander Sein v. Ryan* 2 Boul. 8 p. 11 (1859); on appeal 15 M.O. I.A. 230 (1861); *Sheikh Faizulla v. Ramkamal Mitter* 2 B.L.R. 7 (1868).
⁴ 1 Boul. 480 (1858)

was for several thousands of pounds. It was held that on such a transaction, if a brokerage can be claimable against the seller of the bill, it should be made the subject of a distinct stipulation between the parties. It should be noted that in this case it was found that M & Co. were general and produce brokers, and that they had acted as bill-brokers in transaction connected with sales of produce and in remitting funds in their hands. Their claim to bill-brokerage in certain cases, similar to the present had been acknowledged by banks and mercantile houses and had never before been denied. The payment of such brokerage was acknowledged as customary in Calcutta by many merchants, some of whom justified it as rightly payable in respect of the known character of the plaintiffs as brokers and others of whom based it on special custom and others on anomalous circumstances arising out of the combination of agency and brokerage business in certain firms in Calcutta. A majority of merchants deemed this case a fit one for the claim of brokerage. But there was no evidence of established universal custom even in Calcutta; on the contrary, the right claimed by the plaintiff was denied by merchants of experience. The Court said: "It appears to us that if, on any such transaction, brokerage can be claimable against the seller of the bills, it should be made the subject of a distinct stipulation, and of a clear understanding between the parties. To hold otherwise would be to force upon him as brokers persons whom he never intended to recognize in that capacity, whose offices he never means to use in the transaction, and with whom he dealt, at arms length, as the principal settling the price of the bills and thus to raise a liability which by no contract, express or implied, he undertook. The general principles, which define the character, regulate the functions and determine the rights of brokers, seem to be clearly against the claim. Nor can we hold that any exception founded on special or local custom or otherwise has been established."

Stock
exchange
broker.

A person who employs a broker on the stock exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules.¹ The meaning of this rule is that in such cases the client agrees with his broker that the dealings between them are to be carried on under the rules of the stock exchange so far as they are applicable to outsiders and not under the rules that are applicable only to the domestic forum of the stock exchange.² There is no established usage under which the client of a broker on the stock exchange who has become a defaulter, and whose transactions have been closed at prices fixed by the Official Assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the stock exchange.³

It is a familiar rule that a principal, who employs an agent to purchase goods for him in a particular market is to be taken to be cognizant of, and is bound by, the rules which regulate dealings therein; and the agent is entitled to be indemnified by his principal for all he does in accordance with those rules. Thus where a broker entered into a contract for a customer, which was not completed by transfer before the presentation of a petition for winding up the company, and who was according to the rules and regulations of the stock exchange was compelled to pay the price of the shares to the person from whom he bought, it was held that the broker was entitled to recover back from his principal the money so paid.⁴

Pakka Adat
in Bombay :
its incidents.

Up-country constituents, being unacquainted with Bombay shroffs and merchants, do not deal with them, but deal with well-known Bombay firms, who, on that

¹ *Sutton v. Tatham*, 10 A. & E. C. P. 228 p. 239 (1867); *Bayley v. Wilkins*, 18 L. J. C. P. 273 (1839).

² *Leritt v. Hamblet*, 2 K. B. 53 (1849); *Setth Samur Mull v. Choga Lall*, 5 Cal. 421 (1879) : s.c.

³ *Ibid.* 6 I. A. 238,

⁴ *Whitehead v. Izod*, L. R. 2

account, are known as *pakka adatias*. The following are the incidents of the *pakka adat* system :—

- (i) A *pakka adatia* can allocate any upcountry constituent's order to himself without the knowledge, consent, or permission of the constituent. This may be called the right of allocation in the first instance.
- (ii) A *pakka adatia* receives an order to buy or sell. Accordingly, he enters into a contract with a Bombay merchant. Subsequently, but before the due date, the *pakka adatia* enters into a cross contract with the same merchant on his own (the *pakka adatia's*) account, and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery as the case may be.
- (iii) In such cases, instead of entering into the cross-contract on his own account, the *pakka adatia* can enter into it on behalf of another constituent. The same result follows.¹

When a *pakka adatia* receives a second order from his constituent to enter into a cross-contract and cover his first order against due date, the *pakka adatia* is not bound to carry out the second order in case owing to loss of credit he is unable to do so and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through some other *pakka adatia*.² In a subsequent case where there was no suggestion of the usage of *pakka adat* in the pleadings or the issues, nor was there any evidence to prove it, the Court observed that the view expressed in *Kanji Derji v. Bhugwandas Narotamdas*³ had no application, as the usage proved therein

¹ *Kanji Derji v. Bhugwandas*, footnote.

² *Ibid* 71.

³ *Narotamdas* 7 Bom. L. R. 57 p. 65 (1904); See also 29 Bom. 291 p. 293.

⁴ 7 Bom. L. R. 57.

involved a material departure from the ordinary relations between a principal and his agent, and the learned Judge's view was based on evidence as adduced before him for the purpose of that case. But "obviously the finding in that case cannot be claimed as establishing a usage of which we ought in this suit to take judicial notice."¹

A *pakka adatia* has no authority to pledge the credit of his up-country constituent to the Bombay merchant; and no contractual privity is established between the up-country constituent and the Bombay merchant. The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant either on his account or on account of another constituent and thereby for practical purposes cancel the same. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.²

Vendor and Purchaser.

According to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe at a fixed price net, free godown including duty, or free Bombay Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. It does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.³

A custom which allows a broker to deviate from his instructions is unreasonable since it would deprive a principal of all security and leave him at the mercy of his agent, and the Courts of law will not enforce it.⁴ When a

¹ *Chundulal Suklal v. Sidhruth-
rai Sonjanrai* 29 Bom. 291 p. 299

7 Bom. L. R. 57.

² *Paul Beier v. Chotalal Javer-
das* 30 Bom. 17 p. 23 (1904).

³ *Bhuwanidas Narotamdas v.
Kanji*, 30 Bom. 205 (1905), on
appeal from judgment reported in

⁴ *Arlupa Nayat v. Nursi
Keshurji* 8 Bom. H.C.R. (A.C.J.)
19 (1871).

custom is inconsistent with the terms of a written agreement, evidence of such custom is inadmissible.¹ To be admissible in evidence a custom must not be inconsistent with the provisions of the Indian Contract Act.²

When merchants enter into contracts which are evidenced by bought and sold notes, it is customary, at Calcutta, to deliver bought note to the buyer and the sold note to the seller. It may be true, that merchants dealing *inter se* are not bound by any customary mode of contracting, and that they may adopt another and a different mode of contracting, if they think fit; but the presumption is strongly in favour of the custom, and any alleged deviation therefrom must be strictly proved.³ In a recent case, the Privy Council has practically held in conformity with the more recent English case-law on the subject, that bought and sold notes do not constitute a contract of sale but are mere evidence which may be looked to for the purpose of ascertaining whether there was a contract and what the terms of the contract were.⁴

There is no local custom of merchants in Calcutta justifying a charge of commission by an agent for a sale unless he actually effects the sale.⁵ The custom of corn-factors in England is to sell under a *del credere* commission and when so selling not to mention the purchaser.⁶

¹ *Pike v. Ongley* 18 Q.B.D. 708 (1887); *Barrow v. Dyster* 13 Q.B.D. 635 (1881); *Smith v. Ludha Ghella Damodar* 17 Bom. 129 (1892); *Volkart v. Vottivelu* 11 Mad. 495 (1888).

² *Madhab Chunder Poramanick v. Raj Coomar Doss* 14 B.L.R. 76 (1874).

³ *Cowie v. Remfry* 3 Moo. I.A. 418 pp. 462, 463, (1846). This case has not been followed by the Privy Council in recent cases. See *Durga Prasad Sureka v. Bhajan Lal Lohia* 8 C. W. N. 489 (P. C.)

[1904]. See Woodroffe's Evidence (4th Edn.) p. 463 notes on s. 91 Evidence Act, Article in C. W. N. Vol. VIII notes p. cxxx.

⁴ *Durga Prasad Sureka v. Bhajan Lal Lohia* 31 I. A. 122 (1904); s. c. 31 Cal. 614 : s. c. 8 C.W.N. 489. See also *Tuncaco v. Skinner* 2 Ind. Jur. N. S. 221 (1867), *Mackinnon v. Shihhunder Seal Bourke* 351 (1865).

⁵ *Morell v. Cockerell* 1 Fulton 209 (1835).

⁶ *Hastie v. Courier* 9 Ex. 102 (1853).

Bought and sold notes.

Agent's commission.

CHAPTER XVI.

ILLEGAL AND IMMORAL CUSTOMS.

Customs which are illegal, immoral or contrary to public policy will neither be enforced nor sanctioned. Manu says:—"A king who knows the revealed law must inquire into the particular laws of classes, the laws or usages of districts, the customs of traders and the rules of certain families, and establish their peculiar laws, if *they be not repugnant* to the law of God." So Courts of justice have invariably set their face against customs which are contrary to law, morality, reason or public policy. We propose to note here some of these customs.

A woman
marrying
during the
life-time of
her first hus-
band.

The custom of the Talapda kule caste that a woman should be permitted to leave the husband to whom she has been first married, and to contract a second marriage known as *natra* with another man in his life-time and without his consent, is held to be an illegal custom, being entirely opposed to the spirit of the Hindu law, as no woman can marry during the life time of her husband.² This decision was cited in another case where the accused was charged with adultery and pleaded a *natra* marriage in accordance with the custom of his caste, but was convicted of adultery. On appeal, however, Couch C. J., set aside the conviction.³

Both the cases were criminal. The High Court in remitting the first case directed to the Sessions Judge to take evidence in reference to certain questions framed by their Lordships and then to return his findings on them to the High Court. The Sessions Judge found upon evidence of the heads of the Talapda caste that such

² Manu VIII, S. 41 ; Ordinances 124 (1864).

of Manu, Govt. Publn. p. 194.

³ 5 Bom. H. C. R. (c. c.) 17

⁴ *Reg v. Karsan Gaja* ; *Reg v.* (1868).

Bai Rupa 2 Bom. H. C. R.

custom as pleaded by the accused did exist among the caste. That is to say, in the Talapda caste a woman can leave her first husband and contract a second marriage with another man in the life-time of her first husband and without his consent. The permission of the caste is not necessary as a preliminary to such a contract of second marriage. The permission is sometimes given or withheld subsequently to the contract *i. e.*, on the complaint of the first husband. But if she restores to him any property she might have acquired by her first marriage, she does not lose her position in the caste. The learned Judges, however, were of opinion that such caste-custom, even if proved to exist, was invalid as "being entirely opposed to the spirit of the Hindu law."

Apart from law, such custom is certainly reprehensible on social as well as moral grounds. If it is allowed, then the doctrine of polyandry, which is abhorrent to nearly every religious system, will be admitted to prevail among the Hindus. The Talapda caste, though occupying an inferior position in the gradation of castes, are certainly Hindus. The matrimonial bond will have no force at all if it is held that a wife would be at liberty at any moment to leave her husband and without any formalities whatever. "The intercourse of the sexes, even among the lowest caste in which such a state of society is allowed, will reduce its members to the level of the beasts. Therefore on grounds of social purity and public morality such customs must be discontinued and vetoed by the Courts of law."

In the second case where the conviction of the accused for adultery was set aside by Couch C. J., on appeal, the woman was given an option by a civil court decree either to go back to her first husband or to pay him money as damages. She did not return to her first husband but paid him the money. Then she married the accused. The High Court said that, under the circumstances, it could not be held that the accused and the woman did not believe that the latter was at liberty to marry, she having paid damages

to her first husband in pursuance of the civil court decree. Therefore, the setting aside of the conviction in this case had nothing to do with the approval or disapproval of the custom of *natra* marriage. The point, however, was settled in a subsequent case which was a suit for restitution of conjugal right, and where the defendant pleaded a *natra* marriage, caste custom, and payment of money. The Court, held that, even if the custom was proved, it was an immoral custom.¹ In another case the Bombay High Court laid down that Courts of law would not recognize the authority of a caste to declare a marriage void or to give permission to a woman to re-marry. *Bonâ fide* belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge of bigamy.² But the Madras High Court in a recent case has held that there is nothing immoral in a caste-custom by which divorce and re-marriage are permissible on mutual agreement, one party paying the other the expenses of the latter's original marriage, known as *parisam*.³

Marriage contract for a consideration, if against public policy.

According to Manu the best form of marriage is that in which the father makes a *gift* of his "daughter clothed and bedecked" to a suitable man. The learned sage said that it was sinful for any father to receive gratuity, however small, for giving his daughter in marriage.⁴ Yet, the practice of taking a price of the bride by her parents was at one time very common. The *asura* form of marriage, which is still prevalent in some parts of India is nothing short of a sale of the bride.⁵ For, in this form of marriage "the bridegroom having given as much wealth as he can afford to the father and paternal kinsmen and the damsel herself, takes her voluntarily as his bride." This form of marriage, as the name implies, obtained among the *asuras* or the aboriginal tribes in India. The

¹ *Uji v. Hathi Laln* 7 Bom. H. C. R. (A. C.) 133 (1870).

² *Reg v. Sambhu Raghu* 1 Bom. 347 (1876).

³ *Sankaralingam Chetti v. Subban Chetti* 17 Mad. 479 (1894).

⁴ Vide Manu Peec III, 2-54.
⁵ Vide Manu III, p. 31.

practice of buying a wife by money or by service rendered to the future father-in-law still exists among the Kukis of Cachar,¹ the Lapehas of Darjeeling ;² among the Santals³ and other non-Aryans.⁴

The origin of the custom of paying to the father some value, either by money or by service rendered, for the hand of his daughter may be traced to the natural justice of making good to the father for the loss of services of his daughter. For, we cannot forget that in the early days of our society, every member of a family, whether a man or a woman, a boy or a girl, was of immense service and value to the family.⁵

The system of taking *pon*, *palu* or *hoonda* seems to have been based on the *quid pro quid* principle. It is a sort of pecuniary consideration made to the bride's father to have his consent to the marriage of his daughter with the bridegroom. Many a marriage contract has been made on the basis of such money consideration and any breach of terms has often been fruitful source of litigation between the contracting parties. There is a body of decisions bearing upon the subject. As we are concerned to ascertain under what circumstances such *pon* or pecuniary consideration will offend public policy or morality and when not, we cannot but examine all of them. But our task has been simplified by a recent decision of the Calcutta High Court where one of the learned Judges, after very carefully considering and reviewing all these authorities, has deduced the following rules⁶ :—

(1) An agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced.⁷

¹ (1) S. A. B. Vol. II p. 386.

⁶ *Vide* Spencer's Sociology p. 655 ;

² S. A. B. Vol. X. p. 51.

Mayne's Early History of Institu-

³ S. A. B. Vol. XIV. p. p. 315,

tions p. 324.

316.

⁷ *Bakshi Das v. Nadu Das* 1

⁴ S. A. B. Vol. I. p. 320 and

⁸ C. L. J. 261 p. 266 (1905).

328.

⁹ *Vaithyanatham v. Ganzarazu*

(2) An agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare, but give her to a husband otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy, and ought not to be enforced.¹

(3) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is under the circumstances of the case neither immoral nor opposed to public policy, it will be enforced, and damages also will be awarded for breach of it.²

(4) A suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken.³

(5) Although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to the public policy, yet a suit is maintainable for the recovery of any sum actually paid, pursuant to the agreement, if the contract is broken and the marriage does not take place.⁴

¹ *Visvanathan v. Saminathan* 17 Mad. 9 (1893); *Pitamber Ratansi v. Jagjiban Hansraj* 13 Bom. 131 note (1884); *Dulari v. Vallabdas Pragji* 13 Bom. 126 (1888).

² *Umed Kika v. Nogindas Narotamdas* 7 Bom. H. C. R. O.C.J. 122 (1870); *Mulji Thackersey v. Govti* 11 Bom. 412 (1887); *Lallun Monoo Dossee v. Nobin Mohun Singh* 25 W. R. 32 (1875). See also *Banerjee on Marriage and Stridhun* p. 78; *Norton's Leading cases on Hindu Law*, Vol. I. p. 5; *Steele on Hindu castes* p. 129.

³ *Umed Kika v. Nogindas Naro-*

tamdas 7 Bom. H. C. R. O.C.J. 122 (1870); *Mulji Thackersey v. Govti* 11 Bom. 412 (1887); *Lallun Monoo Dossee v. Nobin Mohun Singh* 25 W. R. 32 (1875).

⁴ *Umed Kika v. Nogindas Narotamdas* 7 Bom. H. C. R. O.C.J. 122 (1870); *Rambhat v. Timmayya* 16 Bom. 673 (1892).

¹ *Juggessur Chakerbati v. Panchcowrie Chakerbati* 14 W. R. 151 (1870); s. c. 5 B. L.R. 395; *Ramchand Sen v. Adaito Sen* 10 Cal. 1054 (1884).

(6) If one of the contracting parties alleges that the agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract.¹

In Bombay *palu* is regarded as a kind of rudimentary marriage settlement. It is a present of money to the bride herself. Hence the giving of *palu* is not considered as contrary to public policy.² In the Punjab the purchase of a bride where she is not regarded as a slave, and the practice of making payments to the parents on marriage, have been established by usage of the community, and are not *malum in se*; and although according to the law of the land a suit between the bridegroom and the father of the bride would not lie, there is nothing to prevent a third party from recovering in a law suit money advanced by him to the bridegroom for the purpose.³

Where a public officer enters into a contract which is unenforceable as being opposed to public policy, persons deriving title through him are in no better position than himself. So where a public officer makes a *benami* purchase of some land which he is prohibited to do, his representatives will be debarred from claiming the benefit of such purchase.⁴ A contract entered into by Hindus living in Assam by which it was agreed that upon happening of a certain event, a marriage was to become null and void, was held as contrary to public policy.⁵

An assignment by the *urallers* or managers of a pagoda of the *urima* rights or right of management thereof is beyond the legal competence of the *urallers* both under the common law of India and the usage of the foundation. The assignment being of a trusteeship for the pecuniary

Purchase of
a bride not
malum in se.

Public policy.

Assignment
of the right
of manage-
ment of a
pagoda.

¹ *Viswanathan v. Saminathan* 13 1867.

Mad. 83 (1889).

² *Jaikisundas Gopaldas v. Har-
kissundas Hullochandas* 2 Bom. 9
(1876).

³ *Shah Gool v. Ikram* 88 P. R.

⁴ *Sheo Narain v. Mata Prasad*

27 All. 73 (1904).

⁵ *Sitaram v. Musst. Aheerec
Heerahnee* 11 B. L. R. 129 (1873)

advantage of the trustee could not be validated by any proof of custom.¹ Similarly the sale of a religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office, is illegal.² So also a transfer of the office of *pujari*, which is hereditary in the family, by one undivided brother to another cannot be held to be valid.³ A priestly office with emolument attached to it is inalienable and would be contrary to public policy to allow offices like this to be transferred either by private sale or by sale in execution of a decree.⁴ The right of an *archaka* (priest) to perform the duties of his office and to receive emoluments attached to the performance of those duties being intimately connected with and essential to the religious worship is not legally the subject of sale.⁵

Prenuptial
agreement by
a husband.

In the case of *Mon Mohini Jomadai alias Mohini Debi v. Rai Basanta Kumar Singha*⁶ the question was whether a Hindu wife can refuse to go and live with her husband at his own house, relying upon certain agreement made before marriages between their parents, whereby the husband bound himself to live permanently and unconditionally at his mother-in-law's house and not to take his wife either to his own house or elsewhere from her mother's house. The wife set up a further defence that it was against the custom of the family for the daughter of the Rajah to go and live in the house of her husband. But the custom was not established. Their Lordships decided the question on the basis of the Hindu law and

¹ *Raja Vurmah Valia v. Ravi Vurmah Mutha* 4 I. A. 76 (1876) : s. c. 1 Mad. 235.

² *Kuppa Gurukal v. Dora Sami Gurukal* 6 Mad. 76 (1882).

³ *Narayana v. Ranga* 15 Mad. 183 (1891). See also No. 106 P. R. 1892.

⁴ *Srimati Mallika Dasi v. Ratani mani Chuckarrati* 1 C. W. N. 493

(1895).

⁵ *Narasimma Thatha Acharya v. Anantha Bhutta* 4 Mad. 391

(1881). See also *Venkatarayar v. Srinivasa Ayyanagar* 7 Mad. H.C.R.

32 (1872); *Rajah of Cherakal v. Mootha Rajah* 7 Mad. H. C. R. 210. (1873)

⁶ 5 C. W. N. 673 (1901).

usage and after very carefully considering the various texts on the legal aspects of a Hindu marriage on the conjugal relation and duties of the married parties and on the marital rights of a Hindu husband, held that such agreement was unquestionably opposed to public policy as "it permanently controls the rights of the husband as conferred upon him by the Hindu law, as soon as the marriage is effected."

Dancing girls in the Deccan form a distinct caste and are numerous. It is well known that these women practise prostitution within certain local limits and earn their livelihood thereby. It may not be the sole means of their livelihood. For they are also professional dancers and singers, and this profession of dancing and singing is quite an honest means of living. And much property is often acquired in this way by these dancing women. But inasmuch as they also live by prostitution, it cannot be denied that a portion, at least, of their gains is derived from immoral sources. Therefore, the question is whether a claim by a prostitute adoptive mother for recovery of certain jewels and other articles belonging to her prostitute adopted daughter and grand-daughter on the ground that they are part of the gains of science is bad by reason of public policy or immorality. It has been held that as prostitution is strictly in accordance with the Hindu law and custom and as, though not numerous, but, uniform precedents have recognized rights of property between the prostitute and her offspring, the question must be decided by the Hindu law.¹

Dedication of a minor girl under the age of 16 years to the service of a Hindu temple, by the performance of the *shej*² ceremony where it was shown that it was

Dancing
girls.

Dedicating
minor girls.

¹ *Chalakonda Alasani v. Chalakonda Ratnachalam* 2 Mad H.C.R. 56 p. 75 (1864).

² The *shej* ceremony is described to be "a kind of marriage cere-

mony in the Bhavin caste, whereby the girl becomes devoted for life to the temple in which the ceremony is performed. This custom is confined to the Malwan

almost invariably the case that the girls so dedicated led a life of prostitution, was a disposing of such minor, knowing it to be likely that she would be used for the purpose of prostitution within the meaning of section 372 of the Indian Penal Code.¹

Certain *deva dasis* or dancing girls attached to a temple claimed for themselves the exclusive rights to introduce dancing girls into the temple, and took exception to the authority of the *dharma-karta* of the temple to dedicate girls to the services of the temple without the consent of the existing body of dancing girls attached to the pagoda. It was claimed on their behalf that they were a necessary part of the religious ceremonies. The Court in dismissing the appeal observed thus:—“What the plaintiffs seek is that they should be declared to have by custom a veto upon the introduction of any new *deva dasi*. In other words, they claim to have acquired by custom a monopoly in their profession of *deva dasi*. We cannot shut our eyes to what is the main purpose of this profession as it is perfectly notorious that it is prostitution and the gains from that source. If the religious services, which the *deva dasis* have to attend, or in which they are required to join, be anything more than a mere veil to cover the real and substantial occupation of their lives, it is still impossible to regard their religious services as disconnected from the other inevitable

Taluka, and Sawantwari and Goa territories. It is thus described by one of the eye-witnesses:—‘A *khangera*, or knife is put on the ground before the idol, and the girl who is to undergo the ceremony puts a garland on the knife; her mother then puts rice on the girl's forehead, and the officiating priest then weds the girl to the knife, just as if he were to unite her to a boy in marriage, by recit-

ing the *mantras*, while a curtain is held between the girl and the knife.’ The girl thus becomes a *Bhavin*, and dedicated to the service of the temple, and cannot marry again, and subsists generally by prostitution after attaining maturity”—*Jaila Bhavin* 6 Bom. H.C.R. 60.

¹ *Jaila Bharin*, 6 Bom. H.C.R. (c. c.) 60 (1869). *Re Padmarati*, 5 Bom. H.C.R. 415 (1870).

pursuit of their profession as *deva dasis*." Then their Lordships further observed that even assuming that the evidence in the case had established the custom and that the custom in some respects fulfils the requisites of a valid custom, still it is clear that if the Court made the declaration as prayed for, it would be recognizing "an immoral custom—a custom, that is, for an association of women to enjoy a monopoly of the gains of prostitution, a right, which on the score of morality alone, no Court could countenance."¹

This case was distinguished in another case reported in the same volume of the Madras Law Reports.² There the suit was brought by a dancing girl to establish her right to the *mirasi* of dancing girls in a certain pagoda and to be put in possession of the said *mirasi* with the honours and perquisites attached thereto as set forth in schedules to the plaint annexed. The District Munsiff, finding that the claim had been established, decreed for plaintiff; but on appeal by the 1st defendant, the District Judge dismissed the suit on the authority of the decision in the case of *Chinna Ummayi*. On second appeal the Madras High Court held that this case was distinguishable from the case of *Chinna Ummayi* "in that there was no allegation in that case of any endowment attached to the office. Here it would seem from the plaint schedule various honours, and more or less valuable sources of income are alleged to be appurtenant to the hereditary office. We think the question of the existence of such an hereditary office with endowments or emoluments attached to it ought to be inquired into, as that would materially affect the question of whether plaintiff has sustained injury by the interference of the defendant." So the decree was reversed and the case was remanded for investigation on this point.³

¹ *Chinna Ummayi v. Tegarai Chetti*, 1 Mad. 168 (1876).

² *Kamalam v. Sadagopan Sumi*, 1 Mad. 356 (1878).

³ For further cases see under Hindu Customs : Adoption and Inheritance, *Supra*.

Unreasonable
customs.

A custom may be said to be unreasonable when it is deemed "unfair and unrighteous" by right-minded men. Consequently whenever a custom seemed to have been unreasonable, the Court refused to recognize it. Thus, when a right to fish in certain *bhilas* was based on a custom according to which, as alleged, "all the inhabitants of the Zemindari had the right of fishing," in them it was held that such a custom was *unreasonable* and as such could not be treated as valid.¹ Similarly a custom which enables a man, after having granted a lease, by simply resorting to a dodge, to deprive the lessee of the entire benefit of his lease, should not be recognized. In the case of *C. R. De Souza v. Pestanji Dhanjibhai*² a Mahomedan leased to the defendant a house at Zanzibar to be held by the latter as long as he pleased at a fixed annual rent. In the lease the lessor expressly agreed never to remove the lessee. The plaintiff, subsequently, with full knowledge of such lease, purchased the same house from the defendant's lessor, and, as such purchaser, sued to eject the defendant. It was alleged that according to the Mahomedan law and custom of Zanzibar, the defendant's tenancy determined upon the sale by the landlord. Assuming that the alleged custom existed, should it be recognized as valid? Their Lordships were of opinion that it should not be, and observed: "It seems to us most unreasonable, as enabling a man, after having granted a lease, at his mere pleasure, by simply resorting to a dodge, to deprive the lessee of the entire benefit of his lease, and that, not only in the absence of any such power reserved, but in the face of an express stipulation not to remove the tenant, and irrespective of the stipulated duration of the lease, and also without the least compensation to the lessee. A custom so unreasonable, even if proved, cannot be regarded as having the force of law."

¹ *Lachmeput Singh v. Sadanla* C. I. R. 382.

Nushyan, 9 Cal. 698 (1882) : s.c. 12

² 8 Bom. 408 (1884).

A commercial custom among buyers and sellers of cotton at Kumpta in Bombay was alleged in a case¹ to the effect that a broker acting for a distant principal is allowed to deviate from his instructions if the state of the market appear to render it desirable. Evidence was given to the effect that a broker, under such circumstances, may use his discretion, unless the principal expressly tells him that he will not be bound by any contract which is not in accordance with his instructions; and that even in that case the principal is bound by the contract, though he may recover damages from the agent. Their Lordship said: "Even if such evidence were sufficient to establish the existence of a custom, it would be impossible to hold such a custom to be a reasonable custom, since it would deprive a principal of all security and leave him at the mercy of his agent."

Contracts, the stipulations of which are *bona fide* and not immoral or contrary to public policy, the Courts are bound to give effect to, although the conditions to be carried out appear to be harsh and stringent.²

A landlord, letting a house to a prostitute for the purpose of her calling, cannot recover rent for the same. The principle which governs the English cases are applicable to this country.³

A cess leviable in accordance with village custom which is not recorded under the general or special sanction of the local Government cannot under section 66 of Act XIX of 1873 be enforced in a civil court.⁴ A demand on *raiyat* of an undefined cess under the name of *russoon kuzza* or Kazee's fees in addition to rent held

Commercial custom.

Landlord and
prostitute
tenant.

Illegal cess.

¹ *Ariapa Nayak v. Narsi* (Sel. cases) 270 (1861).

Kesharji & Co., 8 Bom. H. C. R. (A. C. J.) 19 (1871). See also *Ireland v. Livingston*, 5 C. L. R. 516.

² *Gourenath Mookerjee v. Modhoomonee Peshkar*, 18 W. R. 445 (1872).

³ *Lala v. Hera Singh*, 2 All. 49

⁴ *Chowbey Hurbuns Lall v. Ghosha*, 12 S. D. 3 Decis. N. W. P.

illegal, though tenant admitted previous payment and did not object to paying it in future. The Courts cannot give an award on a claim in itself illegal.¹

A contract by which a tenant as between himself and his landlord undertakes to pay the whole road cess is not illegal. Road cess is not an *abwab* within the meaning of section 74 of the Bengal Tenancy Act.² Section 74 of the Bengal Tenancy Act made all impositions, upon all classes of tenants, including a permanent tenure holder, in excess of the specified rent, illegal. Under section 2 cl. (4) of the Bengal Tenancy Act the landlord cannot now recover the *abwabs* which he could not recover under the old law.³

Immoral customs among Mahomedan Kanchans.

Among Mahomedan Kanchans practices relating to their holding and inheritance of property having an immoral tendency were not recognizable as customs. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law. We have already referred to the Kanchans while dealing with Mahomedan customs.⁴ Speaking of them the Privy Council observed :—“It appears that each family or community live a *caenobitical, quasi-corporate*, life in what the learned Judges call the family brothels. All the members, including males, are entitled to food and raiment from the business, the males living a life of idleness at the expense of the females. There is no such thing as separate or individual succession upon death. All the members succeed jointly. No division or partition is allowed, for that would break up the establishments, and the witnesses say that the lamp should be kept burning in the house. A member of a family brothel who leaves it does so with only her

¹ Luckhee Debba Chowdrain *lah*, 3 C. L. J. 337 (1906).
^{v.} *Sheik Ahta*, 8 S. D. Decis. 552 (1852); see also *Kaleepershad Dey*, 4 Sevestre 255 (1856).

² *Ashutosh Dhur v. Amir Mol-*

³ *Aparna Charan Ghose v. Karan Ali*, 4 C. L. J. 527 (1906).

⁴ *V. idem* 404.

clothes on her back and nothing more. The body is recruited by adoption. A girl is brought in as the adopted daughter of a female member of the institution, and the girl thus adopted is regarded as having ceased to belong to her own family.”¹

As to these customs being prevalent among the Kanchans there seems to be no doubt. But since they aim at the continuance of prostitution as a family-business, they have a distinctly immoral tendency and should not be enforced in Courts of justice. The Privy Council observed : “It seems to their Lordships impossible to say that such customs as are proved in this case to exist among the Kanchans are not contrary to the policy of the great religious community to which the courts have found that all the parties belong.”²

Where property left by a female kanchani, deceased, was claimed by her legitimate kindred, it was held that an ‘adoption’ so called in conformity with the customs, of the tribe, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired was not the subject of the present question, which was only concerned with the right of personal succession to it ; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance.³ The Mahomedan law does not recognize a right of inheritance to property left by a procureress in favour of her slave girls.⁴

¹ *Ghasiti v. Umrao Jan*, 21 Cal. 149 (P. C.) (1893).

149 p. 154 (P. C.) [1893].

² *Bunnoo v. Ghooshan*, 2

³ *Ibid* 156.

S. D. Decis (N. W. P.) 503

⁴ *Ghasiti v. Umrao Jan*, 21 Cal. [1857].

CHAPTER XVII.

MISCELLANY.

Under this head we propose to note some customs which could not very well be included in the foregoing.

Drift timber.

Timbers claimed by a land-owner as having been washed on to his estate by a river is not unclaimed property within the meaning of section 25 and the following sections of Act V. of 1861. It is not necessary for the plaintiff to produce documentary evidence in support of the right or some decree or decision of competent authority establishing the custom. Lords of Manors are allowed to establish rights to wrecks, &c., by long continued and adverse assertion of and enjoyment under such claim.¹ According to the customary usage in the North Konkun all drift timber recovered before it reached the Khambolee bunder was to be given up to the owner on payment by him of the expense of securing it and the *tiaze* or a third, as Government duty, and all timber floating to the sea became the property of the Government.²

Manorial right.

A zemindar claimed the value of half the produce of two fruit trees, standing on the cultivated land held by a *raiyat* on the ground of the custom of the district. A Full Bench decided that where the right claimed to be enforced is not recorded, it is not one which can be maintained with reference to the general custom, but must be proved to have been exercised against the person who disputes it within the period of limitation.³ In another case the zemindars claimed a declaration of their ancient right as against all the tenants of a certain

¹ *Chutter Lall Singh v. The* (1823).

Government 9 W. R. 97 (1868).

* *Phalloo Koovaree v. Muesst.*

² *Khanoo Raoot Kulerkoer v. Imman Bandar Begum* 7 S.D.A. *Dhunbajee Kan* 2 Borr. 301 p. 306 (N. W. P.) Part II. 671 [1864].

village to appropriate all trees of a spontaneous growth, the fruits of other trees planted by the tenants; also to receive as manorial tribute a certain number of ploughs annually and a certain offering of poppy seed and other farm-produce on the occasion of the marriage of persons of the lower caste of tenants, with a further right to levy a certain proportion of the sugarcane manufactories and fields in the village. The Court held that where a custom regarding several cesses was alleged, the existence of the custom regarding each cess should be tried as a separate issue; that parol evidence as to the existence of such customs should be tested by ascertaining the grounds of the witness' opinion.¹ Where the zemindars of a village sued an occupancy tenant for a declaration of their right to maintain a custom which was thus recorded in the *Wajib-ul-urz*: "when necessary one or two bighas out of the tenants' lands are taken with their consent (*ba khushi*) for sowing indigo;" a Full Bench of the Allahabad High Court held that the word '*khushi*' indicated that the land was only to be taken with the occupancy tenant's consent.²

The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common and is not the subject of property. That right may, in certain portions of the sea, be regulated by local custom.³

An easement is a right existing in a particular individual in respect of his land, whilst custom is a usage attached to a locality. Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who for the time being own land in the locality to which the right attaches. The distinction between custom and easement is explained in *Mounsey v. Ismay*,⁴ and the rule of law is that if a custom is shown to

Fishing in
the sea.

Customary
easement.

¹ *Lachman Rai v. Akbar Khan*
1 All. 440 (1877).

² *Baban Mayacha v. Nagu Shravucha* 2 Bom. 10. (1876).

³ *Sheobaran v. Bhairo Prasad*
7 All. 880 (F. B.) [1885].

⁴ 3 H. and C. 486 (1865).

exist under which individuals of a class may obtain independent rights in respect of their land which would be easements if acquired by grant or prescription, those rights are nevertheless easements, though acquired by reason of the custom.¹ A custom is the source of easement and an easement is a distinct right in itself. It ripens into a right by uninterrupted user.² A customary easement must be reasonable and certain³ but an easement which is not a customary right need not be reasonable.⁴

Dhardhoora.

The custom of *dhardhoora* applies to lands thrown up or formed by fluvial action either in one year or in the course of a number of years. Whether it is equally applicable to *chukhee* formations or tracts of land severed by a sudden change in the course of a river and yet preserving their identity of site and surface after the severance must be determined by proof of the extent of the custom.⁵

Customary
right of
privacy.

In India where the *purda* system prevails both among Hindus and Mahomedans, the custom of privacy is quite reasonable and the Courts of law should not hesitate to give recognition to it if properly and satisfactorily established. This question was exhaustively threshed out by the Allahabad High Court in *Gokhal Prasad v. Radho*.⁶ The Chief Justice, Sir John Edge, considered various cases bearing upon the subject and decided by different High Courts. The summary of conclusion which his Lordship arrived at was as follows:—The

¹ *Orr v. Raman Chetti* 18 Mad. 320 p. 325 (1895).

⁴ *Budhu Mandal v. Malat Mandal* 30 Cal. 1077 (1903).

² *Anaji Dattushet v. Moru-shet Bapushet* 2 Bom. H. C. R. 354 (1865); *Mohon Lall Jechand v. Amratlal Bechardas* 3 Bom. 174 (1878); *Kalu Khabir v. Jan Meah* 29 Cal. 100 p. 108 (1902).

⁵ *Musst. Rance Katiyane v. Sheikh Mahomed Shurf-ood-dren* 3 N. W. P. (Ag.) 189 (1868). See also *Nascer-ud-deen Ahmed v. Musst. Oomedee* ibid 1 (1868). *Sibt Ali v. Munir-ud-deen* 6 All. 479.

³ *Kuar Sen v. Mamman* 17 All. 87 (1895); *Orr v. Raman Chetti* 18 Mad. 320 (1895).

⁶ 10 All. 358 (1888).

decisions of the Calcutta High Court¹ are conflicting; but an inference may be drawn from some of those decisions "that where a custom of privacy has been clearly proved, any substantial interference with it would be an actionable wrong, provided of course that such interference was not by the consent or acquiescence of the party complaining." The Madras High Court in *Komathi v. Gurunada Pillai*² held, on the basis of English law, that invasion of privacy is not an actionable wrong. The High Court at Bombay has clearly recognized and given effect to the custom in Gujarat by which a right of privacy is enjoyed where the custom prevails.³ In another case⁴ it expressed its unwillingness to extend the custom prevailing in Gujarat to Dharwar as the evidence in support of the alleged custom was too vague. But it would seem that if by evidence of most satisfactory nature such custom is proved to exist elsewhere than Gujarat the Court would recognize it. The Bombay Court refused to follow the decision of the Madras High Court mentioned above, "in a matter of this kind which is governed by the usage of the district which has been frequently declared. The usage is not altogether singular, as a similar custom is recognized by the law of France."⁵ The Chief Court of the Punjab has acknowledged that a custom of privacy can exist and can be enforced.

¹ Vide *Sreenath Dutt v. Nund Kishore Bose* 5 W. R. 208 (1866); *Mahomed Abdur Rahim v. Birju Sahu* 5 B. L. R. 676; s. c. 14 W. R. 103 (1870), *Sheikh Golam Ali v. Kazi Mahomed Zohur Alum* 6 B.L.R. App. 76 (1871); *Kalee Pershad Shah v. Ram Pershad Shah* 18 W. R. 14 (1872); *Gibbon v. Abdur Rahman* 3 B. L. R. A.C.J. 411 (1869).

² 3 Mad. H. C. R. 141 (1866).

³ Vide *Manishankar Har-*

goran v. Trikam Narsi 5 Bom. H.C.R. (A.C.J.) 42 (1867); *Kurarsi Premchand v. Bai Javer* 6 Bom. H.C.R. (A.C.J.) 143 (1869); *Keshar Harakha v. Gunpat Hirachand* 8 Bom. H. C. R. (A. C. J.) 87 (1871).

⁴ *Srinivas Udpirav v. The District Magistrate of Dharwar* 9 Bom. H. C. R. (A. C. J.) 266 (1872).

⁵ *Komathi v. Gurunada* 3 Mad. H. C. R. 141.

Then as regards the Allahabad High Court his Lordship examined every case on the point from the time of the Sudder Dewany Adawlut up to 1886 and was "of opinion that such a right of privacy exists, and has existed in these Provinces, apparently by usage, or, to use another word, by custom, and that substantial interference with such a right of privacy where it exists, if the interference be without the consent of the owner of the dominant tenement, affords such owner a good cause of action."¹ This decision was followed in a subsequent case and it was held there that the customary right of privacy which prevails, in various parts of the North-Western Provinces is a right which attaches to property and is not dependent on the religion of the owner thereof.²

The Madras High Court in *Sayyad Azuf v. Ameerubibi*³ followed their own ruling as laid down in *Komathi v. Gurunada Pillai*⁴ and declined to follow the Allahabad rulings.

The High Court at Calcutta had occasion to advert to this point in a recent case. There their Lordships pointed out that there was a great difference between the law on the subject of privacy, as prevailing in the North-Western Provinces and as prevailing in Bengal. "According to the rulings of this Court, there is in Bengal no inherent right to privacy and it has been laid down in several cases that such a right can arise in this Province, if it can arise at all, only by express local usage, by grant, or by special permission."⁵

Certain idols were founded and for many years their worship was maintained by the various families descended from the original founders, each of these families in rotation being entitled to the custody of the idols and to a *pala* or turn of worship. It was asserted that by the custom of the family the idol could not be removed from

¹ *Vide* 10 All. 358 p. 387.

⁴ 3 Mad. H.C.R. 141.

² *Abdul Rahman v. D. Emile.*
16 All. 69 (1893).

⁵ See *Sree Narain Chowdhry v. Jadoo Nath Chowdhry* 5 C. W. N.

³ 18 Mad. 163 (1894).

147 p. 149 (1900).

Calcutta, but must be kept in the house in Calcutta of the person who for the time had the *pala*. So when a member of the family, on his *pala* commencing, proposed to remove the idols out of Calcutta, other members brought a suit for declaration of the above family custom. They offered in evidence a deed containing a recital of the custom alleged and a covenant to do nothing contrary to it. It, however, appeared that the defendant was not a party to the deed which was executed by "a considerable majority of the family." Thereupon, the court held that though the deed was admissible as evidence, the custom as against the defendant must be proved *aliunde*.¹ In *Ramanathan Chetti v. Muru Gappa Chetti*² it was held that unbroken usage for a period of nineteen years is conclusive evidence of a family arrangement as to *palas* or turns of worship to which the Court was bound to give effect.

The immemorial custom of the village Kanari Rajapuram, in Negapatam, was that on the expiration of every nine years the village lands should be redistributed among the co-owners. The Court held that this custom is perfectly good.³

In a deed of gift of the nature known as *khairat bishanprit*, made to a Brahman by the proprietor of a Chota Nagpore Raj, it was provided that the grantee and his *al-aulad* were to possess and enjoy the property, but the deed contained no words importing a right of alienation. It was held that, although the words *al-aulad* etymologically include female as well as male descendants, yet according to a custom proved to have prevailed at the time of the grant and subsequently in that part of the country, the words must be interpreted to mean lineal male descendants only.⁴

A village custom.

Al aulad.

¹ *Haronath Mullick and others v. Nittanund Mullick* 10 B.L.R. (O.S.) 263 (1873).

also *Venkatasami Nayakkan v. Subba Rau* 2 Mad. H. C. R. 1 (1864).

² 10 C.W.N. 825 (P.C.) [1906].

⁴ *Perkash Lal v. Rameshwar Nath Singh* 31 Cal. 561 (1904).

³ 2 Mad. H.C.R. 17 (1864). See also *Ibid* p. 5, note (a). See

See also 6. S. D. Sel. Rep. 133 (1886) which was followed.

Custom of
French
India : change
of domicile.

According to the custom of French India, the widow of a divided Hindu, who has no male descendants, takes all his property absolutely as if it were *stridhanam*. By her migrating to British territory and acquiring a British Indian domicile, the character of her estate is not changed. If she does not adopt the system of law prevalent among Hindus in British India, the customary law of French India will adhere to her, and the property inherited by her from her husband will be subject to the same customary law.¹

We shall conclude this chapter by noting now two customs which are only of historical interest, indicative of the state of the country and community at the time when they prevailed.

*Pugla and
Puggee.*

The tracing of the *pugla* i.e., the 'trace' or footsteps, was a very useful measure in the days when the organization of Police to protect property of the subjects from the inroads of robbers and thieves was unknown. In a case, commonly known as the *puggee* case, the headman of a village claimed from the headman of a neighbouring village remuneration in consequence of thieves flying from the latter village into which the thieves were traced by the former. His claim was based on the custom of the country which was as follows:—When any robbery takes place and the robbers escape, the man who is robbed is at once to give information to the village *puggee* i. e., the tracer of footsteps. The *puggee* traces the footsteps of the robbers in his village and traces them up to the boundary of another village. He then makes over the 'trace' to the headman of the latter. This headman is not regarded to have discharged his duty until he had traced the footsteps into another village. If no footsteps are traced within his vallage after certain distance he is liable to make good the loss sustained in the theft, for allowing thieves to escape through his village and not being able to catch them.²

¹ *Milathi Anni v. Subbaraya Mudaliar* 24 Mad. 350 (1901).

² See *Ram Singh Guj Singh v. Ubhe Singh Guj Singh* 2 Borr. 388 (1822).

*Toda garas
huq.*

Toda garas huq was originally a toll or tax levied upon the village communities. As distinguished from the legally acquired and regularly descended *garas*, usually called *wanta*, it was in fact a sum paid to a powerful neighbour or turbulent inhabitant of the village as the price of forbearance, protection, or assistance. It was neither more nor less than a species of blackmail exacted by freebooters from the villagers. Regarding this *huq* a district Judge said : "These yearly payments were at first collected by the *garasias* direct from villages, and when necessary by force ; after the commencement of British rule it became customary for them to obtain permission of some Government officer, and to give security that no violence should be resorted to before proceeding to levy the *huq* ; and, lastly, they consented to forego their privilege of making the collections themselves, and receive the amount from the Treasury, and ever since 1811 they have received the payments from the Government Treasury." In *Umedsangji v. The Collector of Surat*, which was a suit to establish right against the Collector of Surat to receive annually and for ever a *toda garas huq* from a certain village, payable from the Government Treasury, the Court held that, whatever might be the right of the Government as to the collection *toda garas* from villagers, where it did collect *toda garas* it was bound to pay over the amount so collected to the original *garasia* or his representatives if the *huq* is a perpetual one.¹

¹ 7 Bom. H.C.R, A.C.J. 50 (1870).

CHAPTER XVIII.

PROOF OF CUSTOMS.

As customs, when pleaded, are mostly at variance with the general law, Hindu or Mahomedan, they should be strictly proved;¹ for, the general presumption is that law prevails and the allegation of custom is against such general presumption. Hence, whoever sets up any custom has to discharge the *onus* of proving it, with all its requisites, to the satisfaction of the Court in a most clear and unambiguous manner. The Privy Council has in numerous instances laid down that inasmuch as "the legal title to recognition" of a special custom depends on its antiquity, certainty and uniformity, the Courts must be assured of these conditions by means of "clear and unambiguous evidence."² In cases of the aboriginal tribes, however, there is no general presumption that they are governed by the prevailing law. Consequently if they want to support their right to do anything, e.g., to adopt a son, they must prove that by *custom* they have such a right.³ As a custom to have the force of law must be shown to have existed from time immemorial, it cannot be established by a few instances or by instances of recent date.⁴

¹ *Hurpurshad v. Sheo Dayal* 3 I.A. 285; *Beni Madhub Banerjee v. Jai Krishna Mukherjee* 7 B.L.R. 152.

² *Rama Lakshmi Amal v. Siranantha Perumal Sethurayar*, 14 Moore's I.A. 570; *Hurpurshad v. Sheo Dayal* 3 I.A. 285. See also *Chinnamal v. Varadarajula*, 15 Mad. 307.

³ See *Faujindra Dev Raihet v. Rajeswar* 11 Cal. 463; *Bhugrandas Tujmal v. Rajmal alias Hir Lal Lachimandas*, 10 Bom. H.C.R. 241.

⁴ *Kakarla v. Venkata Papayya* 29 Mad. 24 (1905); see also *Chinnamal v. Varadarajula*, 15 Mad. 307 (1892).

Kind of evidence.

In proof of custom limiting or varying well-known rules of law, the kind of evidence that ought to be regarded as conclusive is the evidence showing that the right claimed by custom was more or less contested, and the contest abandoned by some one who, if the custom had not existed, would have been entitled ; or showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. Evidence which is as consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law.¹

The evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it, that they were acting in accordance with law and this conviction must be inferred from the evidence.² It must show that the alleged custom has the characteristic of a genuine custom *viz.*, that it is consciously accepted as having the force of law, and is not a mere practice more or less common.³ The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence but by enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced.⁴ The acts required for the establishment of customary law ought to be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment.⁵ A general custom is not proved by the statements of two individuals or by giving evidence of

¹ *Ramanand v. Surgianni* 16 All. 221 (1894). See also *Varma Valia v. Ravi Burma Kunby Kutty*, I.A. 76 : 1 Mad. 235.

² *Gopalayyan v. Raghupatiayyan* 7 Mad. H.C.R. 250.

³ *Mirabiri v. Vellayanna* 8 Mad. 464 (1885).

⁴ *Lachman Rai v. Akbar Khan* 1 All. 440 (1887).

⁵ *Tarachand v. Rub Rum* 3 Mad. H.C.R. 50 (1866).

two instances when the alleged custom was observed.¹ Evidence of acts, acquiescence in those acts, their publicity, decision of courts, or even of panchayets upholding such acts, the statements of experienced and competent persons, of their belief that such acts were legal and valid will be admissible; but although admissible the evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.² It is not necessary to give documentary evidence in proof of a custom or a usage.³ But it must be proved by clear and unambiguous evidence.⁴ And we need not repeat that when a custom is proved to exist it supersedes the general law.⁵

Judicial decisions.

Though judicial decisions are not necessary for the establishment of a custom, yet they are certainly the most satisfactory evidence of it. Instances of an enforcement of a custom are good evidence but a final decree of a Court of justice based on the custom is conclusive. Decrees on suits in which one party alleged a certain custom and the other denied it, are admissible as evidence of custom in a subsequent suit. If they are not in suits between the same parties, they are not conclusive, but they are excellent evidence to show that the right was asserted at the place by other persons and was recognized by the lawfully constituted legal tribunals.⁶

¹ *Prabhoo Das v. Sheonath* 2 Rev. Jud. and Pol. Jour. 148 (1864).

² *Gopalayyan v. Raghupatiayyan* 7 Mad. H.C.R. 250. Vide s. 18 Evidence Act.

³ *Jeykishore v. Thakordass* 3 Agra 75 (1868).

⁴ *Ramlakshmi Ammal v. Sircaranatha* 14 Moo. I.A. 570 (1872) :

12 B.L.R. 396 : 17 W.R. 558; *Neelkisto v. Beercunder* 12 Moo. I.A.

523 (1869) : 3 B.L.R. 13; 12 W.R.

21 (P. C.) *Sundaralingasami v. Ramasumi* 26 I.A. 55 (1899) : 22

Mad. 515; *Buktyar Shah v. Dhojo-*

moni 2 C. L. J. 20 (1905); *Baidya-*

nand Singh v. Rudranand Singh 5 S. D. Decis. 198 (1832); *Bishnath*

v. Ram Churn 6 S. D. Decis. 20 (1850); *Ramchurn v. Bishnu Nath*

12 S.D. Decis. 399 (1856); *Koernarain v. Dhorinidhur Roy* 14

S.D. Decis. 1132 (1858) ; 7 Mad. 3 (1883); 29 Mad. 24 (1904).

⁵ *Neelkisto v. Beercunder* 12 Moo. I.A. 523 (1869).

⁶ *Gurdyal v. Jhandi Mai* 10 All. 585 (1888); *Nalla Thambi v. Nella Kumara* 7 Mad. H.C.R. 306

(1873); *Madhub v. Tomee Bewah*

Where a custom alleged to be followed by any particular class of people, is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom.¹ But a letter of the Collector containing a summary of the settlements by zemindars for information of the Board of Revenue in a dispute as to the right of inheritance to a zemindari in the same district is not admissible as evidence.²

The *Wajib-ul-urz*³ literally means a written representation or petition. It consists of village administration papers made in pursuance of Regulation VII. of 1822, regularly entered and kept in the office of the Collector, and authenticated by the signatures of the officers who made them.⁴ These papers are admissible in evidence under section 35, of the Indian Evidence Act, in order to prove a family custom of inheritance; or under section 48, as the record of opinions as to the existence of such custom by persons likely to know of it. Such records are not invalidated in Oudh, because made and kept by the settlement officers subordinate to the Collector himself, as required by the Regulation.⁵ A Full Bench of the Allahabad High Court has ruled that a *Wajib-ul-urz*, prepared and attested according to law, is *prima facie* evidence of the custom stated therein but not conclusive. The presumption of the custom may be rebutted by any one disputing it.⁶

Village
Wajib-ul-urz.

¹ W. R. 210 (1867); *Jamtullah v. Pir Buksh* 15 Cal. 233 (1887).

² *Shimbu Nath v. Gyan Chand* 16 All. 379 (1894). See also the cases cited in *Harnath Pershad v. Mandil Das* 27 Cal. 379, pp. 386, 389 (1899).

³ *Ramalaksmi v. Siranantha* 14 Moo. I.A. 570 (1872).

⁴ There is another document, similar to the *Wazib-ul-urz* known as the *Riwaj-i-am* which contains

the customs of the tribes. Vide Tupper's Punj. Customary Law, Vol. I. p. 148.

⁵ *Rani Lekraj Kuwar v. Babu Mahpal Singh* 7 I.A. 62 : 5 Cal. 754.

⁶ *Ibid.* See also *Musst. Lali v. Murlidhur* 10 C.W.N. 730 (P.C.); 3 C.L.J. 594.

⁷ *Iari Singh v. Ganga* 2 All. 876; *Muhammad Hasan* 8 All. 434; *Ram Sarup v. Sital Prasad*, 26 All. 549. *Bhaoni v. Maharaj*

A *Wajib-ul-urz* ought not to be entered on the record as a mere expression of the views of the proprietor of an estate; it should be entered as an official record of local custom.¹ An entry in a *Wajib-ul-urz*, which a person has verified, cannot by reason of such verification be regarded as his will or as a document of testamentary character by him. A rule of succession laid down therein cannot bind his estate after his death.² A *Wajib-ul-urz* is always admissible in evidence being an official village record; but its weight may be very slight or may be considerable according to circumstances.³

Court's duty.

The party who asserts, or relies on a special custom, has on him the *onus* to prove the same by ample and satisfactory evidence. No Court ought to find as established any custom unless it is perfectly satisfied with the evidence adduced in support of the alleged custom, which, it should be remembered, will have the effect, if established, of varying or superseding the general rules of law.⁴ Before affirming the existence of customs, it is particularly incumbent on the Courts to try the existence of the custom regarding each case as a separate issue and to test the evidence. In case of parol evidence given generally as to the existence of a custom the Court should ascertain on what grounds the opinion of each witness is based.⁵

Singh, 3 All. 738 ; Ramchand v. Zohur Ali 1 Agra 134.

¹ *Uma Purshad v. Gondharp Singh, 14 I.A. 127.* See Oudh Land Revenue Act (XVII. of 1876) ss. 16 and 17 about settlement records. Also see Punjab Land Revenue Act XVII. of 1887. s. 31 for Records-of-right.

² *Sahadra v. Gonesh Purshad, 10 C.W.N. 249 (P.C.)* See also *Musst. Lali v. Murlidhur, 10 C.W.N. 730 (P.C.)*

³ *Muhammad Imam Ali v.*

Husain Khan, 2 C.W.N. 737 (P.C.) (1898).

⁴ *Lallah Mohabeer Prasad v. Musst. Kundun Koowar Sevestre Part IV. p. 423 (1867); Rama-linga v. Perianayagum 1 I.A. 209 (1874); Narayan Babaji v. Nana Manohar 7 Bom. H.C.R. 153 (1870); Chhatradhari v. Saraswati 22 Cal. 156 (1894); Desai Ramchoddas v. Rawal Nathubhai 21 Bom. 110 (1895).*

⁵ *Lachman Rai v. Akbar Khan 1 All. 440 (1877).*

To become a *kulachar* or family custom, the usage in question must have been prevalent in the family during a long succession of ancestors.¹ It must have become a distinct tradition in the family—a tradition which would supply the place of ancient example of the application of the usage. To establish a *kulachar* one must at least show one of two things—either a clear, distinct, and positive tradition in the family that the *kulachar* exists, or a long series of instances of anomalous inheritance from which the *kulachar* may be inferred. Where a family usage is set up against the ordinary law of inheritance, it is necessary to show that the usage alleged is ancient, continuous and invariable and that fact must be proved by clear and positive proof.² The evidence must clearly show that the family custom has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience.³

Special family custom must be alleged in the pleadings, otherwise a Court will not be bound to call for evidence of such fact. It must be alleged and proved with distinctness and certainty.⁴ In a suit by a Hindu widow for possession and declaration of title, it was held that the defendant could not be allowed to come in and urge for the first time in appeal that by a family custom or *kulachar* females were excluded from inheriting.⁵

¹ *Sumrun Singh v. Khedun Singh*
2 Beng. Sel. Rep. 116 (147) [1874].

² *Heeranath Koer v. Burm Narain* 17 W.R. 316 p. 326 (1872) : 9 B.L.R. 294. *Ramchunder v. Bishwanath* 12 S.D. Decis. 399 (1856) ; *Koernuarain v. Dharanidhur Roy* 14 S.D. Decis. 1132 (1858). *Ramalakshmi Ammal v. Siranantha Perumal Sethurayar* 14 Moo. I.A. 570 (1872).

³ *Bhan Nanaji v. Sundra Bai*
11 Bom. H.C.R. 249 (1874).

⁴ *Modee Kaikhoosarow v. Coorer-bhau* 6 Moo. I.A. 448; 4 W.R. 94 (P.C.) [1856]; *Serumah Umah v. Palathan Vital Marya* 15 W.R. 47 (P.C.) [1871].

⁵ *Tekait Doorga Pershad Singh v. Musst. Doorga Koonwaree* 13 W.R. 10 : 9 B.L.R. 306 n (1870). For *res judicata*, see *Tekaitui Doorga Pershad v. Tekaitui Doorga Koonwaree* 3 C.L.R. 31 (P.C.) [1878] : s.c. in H.C. 20 W.R. 154,

Of family customs.

A family custom cannot be established by one instance.¹ Where in support of a family custom, only four instances, at most, were adduced and those of a comparatively modern date, the Court held that the custom was not proved.² The unbroken usage for a period of nineteen years is conclusive evidence of a family arrangement to which the Court is bound to give effect, if the arrangement is a proper arrangement and is one which the Court would have sanctioned if its authority had been invoked.³

In proving an ancient family usage, the statements of deceased members of the family are relevant facts and section 49, of the Evidence Act, is applicable to such cases.⁴ When the Court has to form an opinion as to the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant under that section. By section 60 of the same Act, if oral evidence refers to an opinion or to grounds on which such opinion is held, it must be the evidence of the person who holds that opinion on those grounds. It is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has found his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.⁵

Where the members of a family, though affected to be Hindus, were not governed by Hindu law, but had retained, and were governed by family customs which, as regards some matters, were at variance with that law, the

¹ *Sarabjit v. Indrajit* 27 All. C.W.N. 825 (P.C.) [1906].
203 (1904).

² *Chandika Buksh v. Muna Kumar* 29 I.A. 70 (1901); s.c. 24 All. 273 : s.c. 6 C.W.N. 425.

³ *Ramanathan v. Murugappa* 10

C.W.N. 825 (P.C.) [1906].
⁴ *Funindra v. Rajeswar* 12 I.A. 72 (1885): 11 Cal 463.

⁵ *Gururadhwaja v. Superundhwaja* 27 I.A. 238 (1900): s.c. 23 All. 37 : s.c. 5 C.W.N. 33.

onus probandi that the Hindu custom of succession by adoption had been introduced into the family lay on those who alleged the custom; whereas if the family had been subject to Hindu law the *onus* would have lain on those who alleged its exclusion.¹ The *onus* of proving the custom excluding the females lies on the party who alleges it.² Where a party alleges discontinuance of certain family custom, the *onus* is upon him to prove the fact of discontinuance.³

It is irregular to rely upon any book for proving a local custom without calling the attention of the parties to it, and hearing them as to whether the procedure prescribed therein is an incident of the usage.⁴ When a certain right is stated to be founded on a local custom and evidence as to such a right is offered, but no issue is raised as to the custom and the judgments of the lower Courts do not discuss the matter with reference to the custom alleged the High Court, if it thinks it necessary, will remand the case for a direct and distinct finding upon the matter.⁵

Of local customs.

Section 18 of the Indian Easements Act⁶ leaves at large the question of law how a local custom may be established. As such a local custom, when set up, excludes or limits the operation of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by statute law, by grant or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom should be put to strict proof of the custom alleged. A local

¹ *Fanindra Deb Raikat v. Rajeswar Dass* 12 I.A. 72 (1885) : 11 Cal. 463.

² *Ramnundun v. Janki Koer* 29 Cal. 828 (1902).

³ *Sarabjit v. Indrajit* 27 All. 203 (1904).

⁴ *Vallabha v. Madusudanam* 12 Mad. 495 (1889).

⁵ *Kakarla Abbayya v. Venkata Papayya Rao* 29 Mad. 24 (1905); *Lachman Rai v. Akbar Khan* 1 All.

• 440 (1877).

• Act V of 1882.

custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, *mohalla* or village, or at the particular place, in respect of the persons and things which it concerns. To establish a customary right to do acts which would otherwise be acts of trespass on the property of another, the enjoyment must have been as of right, and neither by violence, nor by stealth, nor by leave asked from time to time. To apply the English common law principle that a custom is not proved if it is shown not to have been immemorial would be to destroy many customary rights of modern growth in villages and other places. The statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed.¹

Of adoption.

The burden of proving a special custom, contrary to the general rules of Hindu law, amongst any member of the three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom.² The Jains are Hindu dissenters and adoption amongst them in the Presidency of Bombay, is regulated by the ordinary Hindu law. And when any custom to the contrary is alleged, the burden of proving it is on the party averring the existing of custom.³

For the purpose of proving that by custom, and in the opinion of the Daivadnya caste, an adoption by an untonsured widow was invalid the following evidence was not allowed:—viz., that there had been many instances of adoption in the caste, and in every such case the adopting mother had undergone tonsure and that there had been no

¹ *Kuar Sen v. Mamman* 17 All. 87 (1895).

² *Bhagirandas v. Rajmal* 10 Bom. H.C.R. 241 (1878); *Sheo Gopal Narhar v. Hanmant Singh v. Dakho* 5 I.A. 87 (1878); *Gonesh* 3 Bom. 273 (1879).

³ *I.A. 87 (1878); S.C. 1 All. 688.*

instance the other way; that the caste was divided in opinion as to the validity of the adoption but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The reason for disallowing the evidence was that it would merely prove what the Court, in the absence of evidence to the contrary, would assume to be the case. That is to say, the widows of the Daivadnya caste usually and invariably followed Hindu law which ordains that widows shall shave their heads, and the opinion of the caste people, even if expressed by a majority at a caste meeting, ought not to affect the judgment of the Court, as it is not binding upon it.¹ Section 32 of the Evidence Act is not applicable to a case where the evidence is required to prove a fact in issue and not merely a relevant fact. Thus a statement signed by several witnesses to the effect that a widow cannot adopt, according to the custom of her caste, without the express authority of her husband, is not admissible to prove such a custom under section 32 (4) of the Evidence Act.² A caste custom prohibiting widows from adopting, unless established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden, will not be given effect to by the civil Court.³

The custom of impartibility must be proved in each case by the party alleging it.⁴ In order to control the operation of the ordinary Hindu law of succession, the custom of impartibility, where alleged, must be proved strictly. Proof of the mere fact that an estate has not been partitioned for six or seven generations is not sufficient to render it imitable, and, hence, that fact alone does not deprive the members of the family to which it

Of imparti-
bility.

¹ *Ravji Vinayakrar v. Lakshmi-bai* 11. Bom. 381 (1887).

⁴ *Zemindar of Merangi v. Satru-charlu* 18 I.A. 45 (1890); *Ghir-*

² *Vandravan v. Manilal* 15 Bom. 565 (1890).

dharee v. Koolahul 2 Moo. I.A. 344 (1840); 6 W.R. 1 (P.C.).

³ *Ibid.*

jointly belongs of their right to partition.¹ The fact of the formation of several estates by the partition of one entire estate implies such a connection between the different estates, that the evidence of a custom in one of them would be admissible in support of a similar custom in the others.² Where a zemindari is granted by a *sunnad*, the *onus* is on the zemindar to prove that his zemindari was impartible.³ *Deshghat vatan* or property held as appertaining to the office of *desai* is not to be assumed *prima facie* to be imitable. The burden of proving imitatibility lies upon the *desai*, and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies.⁴

The omission of words of inheritance in a *sunnad*, dated in 1743, granted by the then ruling power, which confirmed a previous grant, not in evidence, of the land being held in *ghatwali*, is not sufficient proof, *per se*, that such grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from father to son as *ghatwali* for more than a hundred years. Before the British rule in India it was customary where the tenure was in fact hereditary and passed as hereditary from father to son, to take out a new *sunnad* from the ruling power on each descent.⁵

Of primogeniture.

The custom of primogeniture must be proved by those who allege its existence.⁶ The question as to whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in

¹ *Durryao Singh v. Dari Singh*
13 B.L.R. 165 (1873).

² *Rup Singh v. Rani Baieni* 11 I.A. 149 (1884) : s.c. 7 All 1.

³ *Zemindar of Merangi v. Sri Rajah Satrucharla Ramabhadra Razu* 18 I.A. 45 (1891).

⁴ *Adrishappha v. Gurushidappa*
7 I.A. 162 (1880) : s.c. 4 Bom. 494 :

s.c. 7 C.L.R. 1.

⁵ *Kooldeep Narain Singh v. The Government* 14 Moo. I. A. 247 (1871).

⁶ *Muhammad Ismail v. Fidayat-un-nissa* 3 All. 723 p. 729 (1881); *Goruradhwaja v. Superundhwaja*

27 I.A. 238 (1900) : s.c. 28 All. 37 :
s.c. 5 C.W. N. 33.

it.¹ The rule of primogeniture has been held to prevail where the estate descended entire to the exclusion of other sons for eight² or fourteen³ generations, or for a period of eighty years.⁴

Where the custom of primogeniture is set up in two ways *viz.* (i) as the custom of the district; (ii) as the custom of the family; and there was nothing to show any local custom except a Collector's letter with respect to a custom extending to all the zemindars throughout the district, while the Court below said that it was perfectly notorious that no such custom was in existence within that district; and of the family custom there was no sufficient allegation: the Privy Council held that the custom of primogeniture, as the local or family custom, had not been proved.⁵

The custom of lineal primogeniture may be proved by—

- (i) Oral evidence showing that it is well understood in the family and in families belonging to the same group that no descendant of a younger branch can take until all the elder branches are exhausted, though no witness is able to point out any actual instance in which the rule has been followed or departed from.
- (ii) Decrees relating to disputes in families belonging to the same group, in which it was decided that the rule of succession was lineal primogeniture, which although not binding on the parties to the suit, show the prevalence of the custom among families having a common origin and settled in the same part of the country.

¹ *Yarlagadda Mallikarjuna v.*

Singh 6 Moo I.A. 164 (1885).

Yarlagadda Durga 17 I.A. 134

⁴ *Gururadhwaja v. Superundh-*

(1890). Zemindar of Merangi v.

waja 27 I.A. 238 (1900): s.c. 23

Satrugharla 18 I.A. 45 (1891);

All. 37.

Jatnath v. Lokenath 19 W.R. 239

⁵ *Umrit Nath Chowdhry v.*

(1873).

Gauri Nath Chowdhry 13 Moo.

¹ *Urjun Singh v. Ghuniam*

I.A. 542 (1870): s.c. 6 B.L.R.

Singh 5 Moo. I.A. 169 (1851).

232 : 15 W.R. 10 (P.C.)

² *Gunesh Dutt v. Moheshur*

(iii) Evidence of precedence conferred, or marked by the titles of honour given to the sons of the reigning Rajah in order of seniority, a precedence which would naturally be attached to the lines of descent traced from them.¹

When all the lines of evidence in a case of primogeniture converge upon the same point and perhaps no one of them would, if standing alone, be conclusive, but, taken as a whole, they are conclusive, the converging evidence is regarded as sufficient proof of the alleged custom.²

Of religious endowments.

The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special law and usages governing the particular community whose affairs became the subject of litigation and to be guided by them.³ The only law as to the *mohunts* and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony.⁴ A person claiming a right to succeed as *mohunt* has to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponents title.⁵ Where from the absence of direct evidence of the nature of a Hindu religious foundation, and the rights and duties and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution.⁶ Any one claiming a customary right to grant confirmation of the election of a *mohunt* must prove the custom. An acknowledgment,

¹ *Mohesh Chunder Dhal v. Kishore Dass* 11 Moo. I.A. 405
Satiughan Dhal 29 I.A. 62 (1902): (1867).

29 Cal. 343.

² *Basdeo v. Gharib Das* 18 All. 256 (1890).

³ *Nitr Pal Singh v. Jai Pal Singh* 23 I.A. 147 (1846); 19 All. 1.

⁴ *Rajah Varmah Valia v. Ravi Varma Kunbi Kutty* 4 I.A. 76. (1876) S.C. 1 Mad. 235.

⁵ *Ramalinga Setupati v. Periannayagum Pillai* 1 I.A. 209 (1874).

⁶ *Greedharee Does v. Nundo*

taken in troubled times from the guardian of an infant *mohunt*, of a zemindar's customary right to control and remove the *mohunt*, is entitled to little, if any, weight as evidence of the custom.¹ If the custom set up is one to sanction not merely the transfer of a *mohuntship*, but the sale of a trusteeship, for the pecuniary advantage of the trustee such an assignment cannot be validated by any proof of custom.²

Where ancestral property has apparently descended in the ordinary way according to Hindu law first to the son and thence to the mother, it lies on those who aver that it is confined to the direct descendants of the original donee, to prove their case and show by some custom that that was the proper construction of the grant.³ Although ordinary Hindu law, in the absence of special customs, has usually been applied to persons of the Jain sect in Bombay, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined and are not open to objection on grounds of public policy or otherwise.⁴ The customs of the Jains where they are relied upon must be proved by evidence, as other special customs and usages varying the general law should be proved. In the absence of satisfactory evidence, the ordinary law must prevail. The mere fact that a person is a Jain is not enough to establish the conclusion that the ordinary law did not apply to him or her.⁵ Judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of

Of inheritance : Jains.

¹ *Ramalinga Setupati v. Perianayagum Pillai* 1 I. A. 209 (1874).

87 (1878) s.c. 1 All. 688.

² *Rajah Vurmah Valia v. Rari Vurmah Kunby Kutty* 4 I.A. 76 (1876); 1 Mad. 235.

³ *Chotay Lall v. Chunnoo Lall*

6 I.A. 15 (1878); s.c. 4 Cal. 744; 3

C.L.R. 465; *Sheo Singh v. Dakho*

5 I.A. 87 (1878); *Harnabh Pershad v. Mandil Dass* 27 Cal.

⁴ *Mehendra Singh v. Johka Singh* 19 W.R. 211 (1873).

379 (1899).

⁵ *Sheo Singh v. Dakho* 5 I.A.

the same custom amongst the Jains of another place, unless it is shown that the customs are different, oral evidence of the same kind is equally admissible.¹

Of marriages.

The family custom as to inter-marriage, being matter of family history, may be proved by declarations made by the members of the family.² Under section 48 of the Indian Evidence Act, opinion of persons who would be likely to know the existence of any custom, subject of inquiry, is relevant and admissible.³

Of maintenance grants.

A grant of maintenance to a junior member of a joint Hindu family is *prima facie* for the life of the grantee. Therefore, where a family or territorial custom at variance with the general characteristic of such maintenance grants is alleged, that custom must be established by clear and unambiguous evidence.⁴

Of Mahomedan customs.

If evidence is given as to general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party disputing the particular Hindu usage in question to show that it is excluded from the sphere of the proved general usage of the community.⁵ Where a special custom of the Khoja community at variance with the rules of Hindu law of inheritance is alleged, the burden of proving the alleged custom rests upon the party alleging it.⁶ Merely opinion of the leading members of the Khoja community will not prove a custom of inheritance among the Khoja Mahomedans at variance with the rules of Hindu law; instances must be cited in which the alleged custom has been observed and followed.⁷

¹ *Shimbhu Nath v. Gayan Chand* 517 (1901).

16 All. 379 (1894.)

² *Bai Baiji v. Bai Santok* 20

³ *Nagendra Narain v. Raghu Nath Narain* W. R. (1864) 20.

Bom. 53 (1894).

⁴ *Dalghish v. Guzaffer Hossein* 23 Cal. 427: 3 C.W.N. 21 (1896).

⁵ *Rahimat Bai v. Hirbai* 3 Bom.

34 (1877).

⁶ *Ibid.*

⁷ *Tituram v. Cohen* 1 C. L.J.

Of tenancy
customs.

The finding of a Court on the existence of the usage under which the right of occupancy is transferable, should not be mainly based on irrelevant matters. Section 13 of the Evidence Act shows the character of the evidence by which a right or custom may be proved.¹ In deciding on the evidence of a custom or usage under which a *raiyat* is entitled to transfer an occupancy holding, regard should be had to section 48 of the Indian Evidence Act. A judgment of the High Court as to the transferability of similar tenures in an adjoining village of the same pergunnah is admissible evidence of such usage under section 42 of the Evidence Act.² In a certain case the lower appellate Court in deciding the question whether an occupancy holding was transferable or not found as follows: "There is abundant evidence on the record to show that such lands are actually sold in the locality and the *kobalas* filed in this case support the fact." The High Court held that this did not amount to a finding of local usage³. In order to establish 'usage' it is not necessary to prove its existence for any length of time. The statements of persons in a position to know of the existence of a custom or usage in the locality are admissible as evidence under section 48 of the Indian Evidence Act.⁴

The words 'established usage' in section 53 of the Bengal Tenancy Act of 1885, do not refer to a practice previously prevailing between the landlord and his tenant, but to the established usage of the pergunnah in which the holding is situate.⁵

In an inquiry as to whether tenures of a certain class are transferable according to local customs, it is sufficient if there be credible evidence of the existence and antiquity

¹ *Palakdhari v. Manners* 23 Cal. 181 (1900).

179 p. 184 (1895).

⁴ *Seriatullah v. Ban Nath* 26

² *Dalgleish v. Guzaffer Hossein* 23 Cal. 427 (1896); *Sariatullah v.*

Cal. 184 (1898).

Ban Nath 26 Cal. 184 (1898).

⁵ *Hira Lal v. Mathura* 15 Cal.

Ban Nath 26 Cal. 184 (1898). 714 (1888).

³ *Dino Nath v. Nobin* 6 C.W.N.

of the custom, and none to the contrary. There is no necessity for the witnesses to fix any particular time from which such tenures became transferable.¹ In order to make a right of *raiayati jumma*, which is no higher than a right of occupancy, transferable, it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated.² In a suit for ejectment the burden is on the tenant to prove that the tenure is permanent. In Bengal the tenant is not bound to prove a special local custom to make out that the tenure was permanent.³

Of mercantile usages.

To establish a mercantile usage, it is not necessary that the evidence of instances in support of it should be marked by *antiquity*, because the usage may be still in course of growth. It will be enough if from the evidence the usage appears to be well-known and acquiesced in.⁴ Sometimes, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon. But that is only where the law remains doubtful. But even there the custom must be proved by facts, not by opinion only.⁵ "The established usage of dealing in the mercantile world should be held in high respect; the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour and no departure from it is to be inferred from doubtful circumstances and especially not from circumstances which in the opinion of mercantile men generally would not be conceived to produce any such consequences."⁶ In *Kirchner v. Venus*⁷ the Privy Council observed that when

¹ *Joy Kishen v. Doorga Narain* 11 W.R. 348 (1869).

also *Kanji v. Bhugandas* 7 Bom. L.R. 57 (1904).

² *Unnopoorna v. Ooma Churn* 18 W.R. 55 (1872).

³ *Cunningham v. Fonblanque* 6 C. and P. 44 (1833); *Lewis v. Marshall* 7 M. and G. 729 (1844).

⁴ *Nilratan v. Ismail Khan* 8 C.W.N. 895 (1904).

⁵ *Cowie v. Remfry* 3 Moo. I.A. 448, 465 (1846).

⁶ *Juggomohun Ghose v. Manich Chand* 7 Moo. I. A. 263 at p. 282 (1859) : s. c. 4 W.R. (P.C.) 8, See

⁷ 12 Moo. P. C. 361 (1859).

evidence of the usage of a particular place is admitted to add or in any manner affect the construction of a written contract it is admitted on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their agreement with reference to it, and no such presumption can arise when one of the parties is ignorant of the usage.

Evidence of usage has been admitted in cases of contracts relating to transactions of commerce, trade, farming or other business—for the purpose of defining what would otherwise be indefinite, or to import a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties.¹

The question whether evidence of custom which alters the meaning of a written contract can be given to contradict the plain meaning of certain words of a written contract was raised in the case of *Heilgers & Co. v. Jadub Lall Shaw*,² but it was not necessary to decide the point as there was nothing in that case amounting to evidence of custom to show that a different meaning should be put on the words from the natural one. In *Morris v. Panchananda*,³ however, it was held that oral evidence of a custom to vary a written contract was not admissible. A custom cannot affect the express terms of a written contract.⁴ The Sudder Dewany Adawlut of Bengal laid down that in the interpretation of contracts the law and custom of the place of the contract must govern in all cases in

¹ Phillipps and Arnold on the Law of Evidence Vol. II 415, 10 Edn. cited by Lord Campbell in *Humphrey v. Dale* 7 E. and B. 273 (1857) : s. c. 27 L. J. O. B. 399 on appeal.

² 16 Cal. 417 (1889).
³ 5 Mad. H.C.R. 135 (1870).
⁴ *Indur Chandra v. Laehni Bros. v. Vettirelu* 11 Mad. 459 (1888).

which the language is not directly expressive of the actual intention of the parties.¹ Under section 92, proviso (5) of the Indian Evidence Act, evidence of alleged custom or usage is not admissible to explain or vary the natural and ordinary meaning of the words in the contracts.² The words "usage of trade" are to be understood as referring to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, and not from evidence *in pais*.³ A custom of usage of trade must in all respects be consistent with law⁴ and it should not be repugnant to, or inconsistent with, the express terms of the contract made between the parties.⁵ Where evidence of custom of trade is offered not to vary but simply to explain the terms of the contract, it is admissible on the principle on which evidence of usage of particular trade is admitted.⁶ Where the evidence of custom contradicts the term of a written document, it is inadmissible.⁷ It should be noted that the construction of a contract, unless there be something peculiar to the words by the reason of the custom of the trade to which the contract relates is for the Court *i.e.*, as distinct from the jury.⁸

¹ *Ramneedhee Lahoree v. Gopee Kishen Gosain* 13 S. I. Decis. Part 1. 1132 (1855).

² *Smith v. Ludha Ghella* 17 Bom. 129 (1892); *Alexander v. Davis* 2 Times L. R. 142 (1885); *Motion v. Michaud* 8 Times L.R. 253 (1892); *Joyuson v. Hurt* 10 C.W.N. c.c.xxvi. (1905).

³ 1 Smith's L. C. (9 Edn.) 581.

⁴ *Indian Contract Act* s. 1. *Meyer v. Dresser* 16 C.B N.S. 646 p. 660 (1864).

⁵ *Volkart Bros. v. Vittivelu* 11

Mad. 461 (1888); *Smith v. Ludha* 17 Bom. 129 (1892).

⁶ *Humfrey v. Dale* 7 E. and B. 266 (1857); *Fleet v. Mourton L. R.* 7 Q.B. 126 (1871).

⁷ *Pike v. Ongley* 18 Q. B. D. 708 (1887); *Barrow v. Dyster* 13 Q.B.D. 635 (1884); *Smith v. Ludha Ghella* 17 Bom. 129 (1892); *Volkart v. Vittivelu* 11 Mad. 459 (1888).

⁸ *Bowes v. Shand* 2 Aps. Cas. 455 (1877); *Smith v. Ludha Ghella* 17 Bom. 129 (1892).

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